PROFESSIONAL RESPONSIBILITY

A CONTEXT AND PRACTICE CASEBOOK

TEACHER'S MANUAL

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INTRODUCTION

Thank you for considering using this text. I hope you and your students find the text useful and engaging.

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Overview of Teaching Manual

In this teaching manual, I have tried to provide resources useful to you in planning the course, designing learning activities, and assessing student learning. I think of this manual as an invitation to step into my classroom and watch the various ways I have taught (or tried to teach, or saw others teach, or thought about teaching) the subject matter in this text. I do not summarize the text (much of which is narrative summary of the law already) nor do I brief the cases (though I do provide guides for how I might expect a discussion of those cases to proceed in class, through a Q&A format). I do provide suggestions for using all of the problems and assignments in the text, including grading guides and sample answers. I provide a variety of methods for using the classroom to allow the students to test their understanding as well as extend their learning through practice-centered exercises and open-ended discussion questions. In the electronic supplement I provide a set of PowerPoint slides as a starting point for those who prefer to use this method to structure class.

Most importantly, I think of this manual as a continual work in progress and an invitation to a conversation. I would be thrilled to have a faculty member using the text or teachers manual share their perspectives, approaches, problems and materials, so that we can all improve our teaching and the students' learning and professional development.

Part One provides a variety of methods for organizing the course and sample syllabi. There are many different elements to consider in designing your course, from your teaching schedule to the culture of teaching in your law school. In this chapter, I address overall learning outcomes for the course. The text is oriented toward some fairly standard learning outcomes: critical reading and analysis of rules and the ability to apply those rules both to solve problems and to prevent them.

The text also provides instruction and exercises for three additional learning goals that are less common in doctrinal law school courses. First, the text provides a number of opportunities for students to reflect on the course contents and how that content fits within their own professional development. I provide more detailed guidance on using these reflection exercises and developing others in Appendix A. Second, the text provides research instruction and exercises. Even though research is one of the most common activities for new attorneys, its

instruction in the law school does not reflect its significance in practice. Particularly with professional responsibility issues, including a research component helps students to learn the doctrinal content deeply and appreciate the highly regulatory nature of legal practice today. I provide more detailed guidance on integrating and using research exercises in Appendix B. Third, the text provides a variety of skills exercises that I consider central to ethical practice: practice management tools and communication skills. I emphasize skills development in my classroom because it is an important outcome goal in itself. However, I realize that the classroom is a venue only for introducing skills and that the required professional responsibility course provides neither the time nor the setting for truly authentic practice or significant development of those skills. A focus on skills also places doctrinal learning in context and that insures that students are learning that doctrine in a way that will survive the final exam or the MPRE.

Part Two provides a chapter-by-chapter guide to the materials in the text. Backwards design of a course requires that you begin at the end with learning outcomes, then design assessments, and finally, think about assignments and learning activities. I have provided guidance on assessment for each chapter's learning objectives. In particular, I note some of the most common misconceptions I have found students bring to the materials. Moving students away from these mistaken assumptions requires that students be given the opportunity to see and correct their errors. Many of the suggested classroom assessment activities are designed to uncover and correct these misconceptions.

In terms of classroom teaching strategies, the chapter-by-chapter guides include suggestions for a variety of classroom learning activities. Few professors will have the time to incorporate all of these activities into their classrooms. These are meant to be menus of various activities you could use, depending on your students, priorities, and culture. Suggestions for assignments, handouts, and guides to additional resources and materials are also provided. The course website contains PowerPoint slides for you to modify and use as is useful for your teaching strategy. Finally, I provide you my own teaching notes for each chapter's materials.

In recent years, I have most often taught Professional Responsibility using the "team-based learning" strategy. Because this is a comprehensive strategy that requires an overall design and method different from most classroom teaching strategies, I provide particular advice about how to structure the PR course using this method in Appendix C.

Part One: Overview of Teaching Choices

I. The Importance of Destinations

Likely the most dominant assumption driving this teaching manual is the importance of knowing what we want students to learn and placing a high priority on constantly finding out

whether and how much they are indeed learning. I believe that in teaching, for too long, faculty have measured their success by their inputs—the carefully chosen course materials, the meticulously planned learning activity, the brilliantly delivered lecture—without asking whether all this teaching is actually resulting in learning. When we read the exams or papers at the end of the semester, and see that some percentage of the students didn't learn what we expected them to learn, we may be inclined to shake our heads and wonder why the students didn't learn. And it certainly is true that students are ultimately responsible for insuring their own learning. But in the end, if students aren't learning, we need to take some responsibility for that.

My teaching is driven by the view that outcomes count. Now that's not to say the process doesn't count as well. As professors of Professional Responsibility, we know from plenty of studies of malpractice that patients and clients will forgive doctors and attorneys even fundamental errors if they believe their professional cares about them and is working hard on their behalf. So, yes, in a fundamental way, it is important that the students know that you care about them and are working hard on their behalf. It is your malpractice insurance.

But if we want to turn from avoiding malpractice and instead focus on improving student learning, we must approach our teaching from an *assessment perspective*. The first step in an assessment process is to think deeply about destinations. Where do we want our students to arrive after the journey through our course? In educational parlance, what are our learning outcomes? Second, we must think about checkpoints—how will we know if students are on course or if they've gotten waylaid or detoured along the way? Again, this is what educational literature would characterize as assessment. After planning outcomes and assessments, an assessment mindset uses that planning to plan the rest of the trip: the selection of subject matter, course materials, and learning activities.

Part of the purpose of this teaching manual is to serve as a practical tool for helping teachers of Professional Responsibility to develop effective and efficient assessment practices. A carefully structured program of assessment: the identification of discrete legal research skills outcomes, with defined levels of proficiency, and tools for assessing those proficiencies, can provide both incentive and structure necessary to effectively preparing students for the daunting responsibilities and challenges of becoming ethical balanced attorneys. The assessment approach to teaching can give faculty and students alike an energy and confidence that will fundamentally change how we think about teaching and learning in law school.

The professional responsibility curriculum shares many learning goals with the rest of the curriculum. We want students to be able to read and analyze a complex set of rules; be able to articulate and use foundational concepts (in our courses those might be confidentiality, conflicts of interest, fair play, and access to justice); and to be able to discern and navigate the power struggles implicit in multiple layers of regulation, to name a few.

However, Professional Responsibility presents some unique demands and opportunities in the curriculum. As a required course, one could expect that Professional Responsibility has certain responsibilities to deliver core learning outcomes for all graduates. Indeed, Professional Responsibility is the only course in the curriculum that is generally regarded as required by accreditation standards. Moreover those standards describe a breathtakingly broad set of learning goals. Standard 302(a)(5) provides that law schools require that "each student receive substantial instruction in… the history, goals, structure, values, rules and responsibilities of the legal profession and its members." Interpretation 302-9 does little to provide more guidance on how instructors are to accomplish this goal, adding only the detail of content required by this instruction: "the law of lawyering and the Model Rules of Professional Conduct of the American Bar Association." By adding this detail to the interpretations, perhaps originally designed to emphasize that hortatory lecture series on "professionalism" would not substitute for doctrinal instruction, the ABA singled out mastery of certain black-letter law among the many objectives listed in the standards. While not all of our students would agree that the course should be required, most would concur that its focus should be the law of lawyering.

At the same time, pressures have increased on law schools to broaden their objectives—covering more subjects and more skills to a higher level of proficiency than ever before. Some of this pressure comes from practice, where the decline in mentoring and the economics of practice put pressures on law schools to deliver students ready for practice. Some comes from our students, who by their third year of law school have become bored by the same drill of survey and exam, and are hungry to have a greater connection between their studies, their future career, and their own personal identities. Some of the pressure comes from within the academy.

The Carnegie Report on Educating Lawyers, for example, urges contextualizing the classroom's legal analysis and doctrine.[1] The study challenges law schools to give great emphasis to these practice contexts and skills. Since Professional Responsibility is the one course in the curriculum which nearly every student will be using in practice regularly, professors are increasingly called upon to extend learning outcomes to include the skills necessary to insure compliance with professional standards.

Finally, Professional Responsibility is also called upon to address "the apprenticeship of professional identity"[2] helping students to refine their ethical and moral reasoning.[3] As explained by the authors of that report, "Professional identity is in essence, the individual's answer to questions such as, "Who am I as a member of this profession? What am I like, and what do I

[1] WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND, AND LEE S. SHULMAN, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 56-57 (The Carnegie Foundation for the Advancement of
[2] *Id.* at 135.
[3] *Id.* at 57-58.

want to be like in my professional role?" and "What place do ethical-social values have in my core sense of professional identity?" [4]

None of this is to say that the professional responsibility course bears responsibility for all these learning outcomes alone,[5] but it does emphasize the significant demands on the course. How do teachers of Professional Responsibility begin to think about structuring their courses and teaching to meet these demands? While it may seem backwards to begin with outcomes assessment, it is nonetheless a powerful point at which to begin. Educational researchers have demonstrated that students learn more and better when learning goals are clear,[6] when they are given opportunities to practice what they are learning,[7] and when they receive feedback on their learning.[8] These are the essential elements of outcomes assessment-driven education.[9] All good teachers regularly undertake outcomes assessment, though they may not name the process as assessment. Whenever we give a test or assign an essay, look at the responses to see where students have done well or not so well, and reconsider our approach to teaching in light of that information, we're doing a form of assessment. Outcomes assessment simply makes that process more explicit and systematic.

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[4] *Id.*

[5] Indeed there have been ongoing calls for teaching ethics across the law school curriculum have Professor Rhode is a leading exponent of the pervasive method. See, e.g., DEBORAH L. RHODE, PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD (2d ed. 1998).

[6] *Okianer Christian Dark, Statement of Good Practices in Legal Education: Principle 6: Good Practice Communicates High Expectations,* 49 J. LEG. ED. 401 (1999); *B. Glesner Fines, The Impact of Expectations on Teaching and Learning*, 38 GONZ. L. REV. 89 (2002/03).

7 Gerald F. Hess, *Statement of Good Practices in Legal Education: Principle 3: Good Practice Encourages Active Learning,* 49 J. LEG. ED. 401 (1999); R Lawrence Dessem, *Statement of Good Practices in Legal Education: Principle 4: Good Practice Emphasizes Time on Task,* 49 J. LEG. ED. 401 (1999).

[8] Terri LeClercq, *Statement of Good Practices in Legal Education: Principle 4: Good Practice Gives Prompt FeedbackLearning,* 49 J. LEG. ED. 401 (1999).

[9] Outcomes assessment has been an important part of university accreditation systems since the 1980s when a series of studies of higher education raised issues of accountability. Development of assessment for learning in professional schools did not respond as quickly as undergraduate programs, primarily because licensing exams, such as the bar examination, were seen as acceptable summative assessments of graduates. To read more about the history of outcomes assessment in legal education, see GREGORY S. MUNRO, OUTCOMES ASSESSMENT FOR LAW SCHOOLS (2000).

While recent attention has been given to proposed ABA standards focusing on outcomes assessment, the Standards have provided for this assessment for some time, albeit at a very high level of generality. In 1996, Standard 302 required "an educational program designed to provide its graduates with basic competence." Am. Bar Ass'n, Standards and Rules of Procedure, Standard 302(a)(2) (1996). Without measures for defining competence, the standard did little to further learning-centered measures and three years later this bold step forward took one step back, when the outcome-focused "competence" requirement of Standard 302 was removed and replaced with an input measure: "substantial instruction."

Assessment of knowledge and analytical skills has retained this inputs or instruction driven model. The most current amendments being considered for standards for approval of law schools would bring law schools into assessment conversation, by requiring law schools to identify learning outcomes, design assessments of those outcomes, and use that data to improve learning.

A. Choose Significant Learning Outcomes

The assessment process requires beginning with outcomes—with the destinations we plan for our student's journey through law school. Why do we begin with these destinations? Think about planning a vacation for your family. "Where shall we go?" has to be the first question. And that question is, of course, one that must be answered with the resources and preferences of the family in mind. Likewise, choosing and communicating the educational destinations you have planned for students is critical to the success of the journey. A professor need only utter the magic phrase "on the exam…" to confirm decades of educational research that emphasizes how much assessment drives student learning.

There are several ways in which we might not plan our educational journeys very well right now. To continue to travel analogy, some of us know where we are going and how we will get there and we're hoping our students will follow along, but we don't often check in the rear view mirror to see if our students are with us. Some of us might take such a scenic route to our destination that our students are actually misled about where we are headed. Some of us are so concerned about being in control of the trip that we don't give our students an opportunity to let us know that we need to go a little faster, a little slower, or for that matter, that they'll meet us (or even beat us) there.

So how do we improve how we think about these destinations—how do we choose and articulate these learning outcomes? In *Making Learning Whole*, educational specialist David Perkins emphasizes that learning is most effective if learners "work on the hard parts."[10] Similarly, Grant Wiggins and Jay McTighe, in their work on *Understanding by Design*,[11] emphasize beginning the search for course goals by looking for the "Big Idea" in the course. These are the ideas that can be used throughout a legal career and that require a lot of work to really understand the complexities of the concept. Concepts about which there is a great deal of controversy are often good themes for significant learning goals. However, the value of this notion of a "big idea" is not limited to doctrinal or theoretical concepts—skills and clinical courses have thematic structures as well. Think about ideas such as the role of empathy in effective legal practice, a client-centered approach to counseling, or a particular model for approaching legal research. These big ideas that may form the theme of a skills-focused course can easily meet the qualifications above.

Thus learning goals might include subject matter goals, skills goals, or values and attitudes goals. The divisions here are artificial of course. Any worthwhile theme is likely to require students to have a core body of knowledge, to apply or develop some set of skills relevant to the theme and to reflect a set of values and attitudes. Even in a purely knowledge-driven course, students cannot acquire knowledge in law school without having also acquired

[10] DAVID N. PERKINS, MAKING LEARNING WHOLE: HOW SEVEN PRINCIPLES OF TEACHING CAN TRANSFORM EDUCATION 83-89 (2010).
[11] GRANT P. WIGGINS & JAY MCTIGHE, UNDERSTANDING BY DESIGN 46 (2nd ed. 2005).

some analytic skills and some (often implicit but nevertheless present) values about that knowledge. The question is one of emphasis—we must in all our teaching determine the priorities of learning goals.

This is especially so in the professional responsibility course, where values underlie nearly every topic. For example, most courses in Professional Responsibility address topics such as formation of or withdrawal from the attorney-client relationship. We expect that students can identify the elements of an attorney-client relationship and restate accurately the rules governing withdrawal. However, we are very likely to expect students to have the skills of reading these rules and deriving their meaning, and the analytical skills necessary to apply these to resolve difficult client representation situations. We might also extend these subjects to integrate skills instruction such as drafting non-engagement or disengagement letters into this subject. Regardless of how we teach these rules, however, we will be teaching values about client representation in the very ways in which we pose questions and the viewpoints from which we approach these rules. A discussion of the steps necessary to withdraw upon client non-payment, for example, raises implicit values about the balance between earning a living and representing clients. Being aware of the values that rules implicate and making conscious choices about how we frame those values in our assignments and learning activities is yet another aspect of choosing learning outcomes.

One very effective way to think about learning outcomes is the concept I think of as *unlearning outcomes*—focusing major learning outcomes on preventing and addressing predictable misunderstandings in the course.[12] Thus, for example, much of the first year of law school is devoted to "unteaching" the positivist philosophy of students who believe the law is resolutely determinate.[13] These fundamental misunderstandings block learning. [14] Students construct knowledge by building on prior understandings. If those prior understandings are incomplete or incorrect, new learning will be flawed as well. Thus, "teachers need to pay attention to the incomplete understandings, the false beliefs, and the naive renditions of concepts that learners bring with them to a given subject."[15]

Some of the most fundamental misconceptions that students bring to a subject from their own experience (or from bad course outlines passed around from prior semesters) must be discovered in the classroom. Brief classroom assessment devices such as "minute papers" or

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[12] *Id.*

[13] James Maule, *Crumbling Myths and Dashed Expectations,* in TECHNIQUES FOR TEACHING LAW II 90-91 (Gerald F. Hess, *et. al.,* eds., 2011)

[14] M. Suzanne Donovan and John D. Bransford, *Introduction*, in NATIONAL ACADEMY OF SCIENCE, HOW STUDENTS LEARN: SCIENCE IN THE CLASSROOM (M. Suzanne Donovan and John D. Bransford, eds., 2005) . ("Students come to the classroom with preconceptions about how the world works. If their initial understanding is not engaged, they may fail to grasp the new concepts and information, or they may learn them for purposes of a test but revert to their preconceptions outside the classroom.")

[15] NATIONAL RESEARCH COUNCIL, COMMITTEE ON DEVELOPMENTS IN THE SCIENCE OF LEARNING, HOW PEOPLE LEARN: BRAIN, MIND, EXPERIENCE, AND SCHOOL: EXPANDED EDITION 10-11 (2000).

statements for the students to complete can easily generate a range of incorrect or incomplete understandings for any given topic.[16] Many of the learning outcomes in the textbook and in my teaching focus on identifying and dispelling these misconceptions

B. Prioritize

After you have narrowed down some priorities for learning goals, you must then depend on the level of proficiency you will expect for student learning. Will this class introduce this knowledge, skill or value or will your class be building on prior learning so that you can expect greater mastery? The choice here, of course, is that of depth v. breadth. The bias implicit in the "big idea" approach to course planning is toward depth. An idea big enough to stand the test of time, to be controversial and subtle, to yield long-lasting insights, is likely one that must be revisited class after class, in ever deepening circles.

Integrating these learning outcomes into a standard curriculum may seem impossible because there is so much content to be "covered" in our courses. "Too often, classes aspiring to skill development morph into classes about the substantive legal framework of a particular subject, with professors expressing concern about whether they have covered enough of the substantive framework during the course of the semester"[17]

The problem is not confined to legal education. "The curse of coverage" has bedeviled curriculum development throughout academia. Harvard Education Professor David N. Perkins refers to this phenomenon as "aboutitis" creating "endless learning about something without ever getting better at doing it."[18]

This drive for coverage persists, despite the research on learning that establishes that teaching more content does not necessarily result in more learning. "If learning is to endure in a flexible, adaptable way for future use, coverage cannot work. It leaves us with only easily confused or easily forgotten facts, definitions, and formulas to plug into rigid questions that look just like the ones covered."[19] Research at many different levels of education has reinforced this essential understanding: more content does not necessarily translate into more learning. Studies of student learning in undergraduate and high school support this finding.[20] For example, in a

[16] For more complete description of how to use classroom assessment techniques, see Barbara Glesner Fines, *Classroom Assessment Techniques in Legal Education* (2001), at http://law2.umkc.edu/faculty/profiles/glesnerfines/cats.htm.

[17] Phyllis Goldfarb, *Back to the Future of Clinical Legal Education*, 32 B.C.J.L. & SOC. JUST. 279, 287 (2012), at http://lawdigitalcommons.bc.edu/jlsj/vol32/iss2/4.

[18] PERKINS, *supra* note 10, at 6.

[19] WIGGINS & MCTIGHE, *supra* note 11 at 46 (2nd ed. 2005)(quoting Lee Shulman, *Taking Learning Seriously*, 31(4) CHANGE 10, 12 (July/August 1999).)

[20] Jay Mathews, *Will Depth Replace Breadth in Schools?* WASHINGTON POST, February 27, 2009 available online at. http://voices.washingtonpost.com/class-struggle/2009/02/will_depth_replace_breadth _in.html. A 2005 study of 46 countries found that those whose schools had the best science test scores covered far fewer topics than U.S. schools.

study of 8,310 undergraduates, researchers found that students whose high school science classes emphasized depth over breadth achieved better grades in their freshman college science courses than students whose high school courses were more balanced.[21] The advantage for students whose high school teachers choose depth over breadth was "equal to two thirds of a year of instruction over their peers who had the opposite high school experience."[22]

The explanation from cognitive science for this increased learning is important to legal educators. For learning to occur, students must be able to build new concepts on the schema they bring to a course. However, the schemas that students bring to a course are often incomplete and inaccurate. To displace that framework and build new understandings takes time. "It takes focused time for students to test their ideas and find them wanting, motivating them to reconstruct their knowledge."[23]

Medical schools, for example, face the same pressures for coverage as do law schools. Researchers have noted that "The information density problem in medical schools is being compounded annually as the biomedical literature expands."[24] Yet research studies in medical education have demonstrated that, here too, "Students tend to retain high levels of learned materials only briefly unless the information is frequently reviewed or applied."[25]

In the choice between depth and breadth, the ever-present drive for "coverage" implicit in the growing size of course books consistently lends advantage to the "breadth" side of the equation. Likewise pressures for bar exam preparation may drive teachers of Professional Responsibility to emphasize more doctrine in the belief that this emphasis will improve student preparation for the MPRE.[26] However, there is little evidence to support this hypothesis. [27]

Some anecdotal evidence suggests that students who have failed the bar tend to avoid courses on bar-tested subjects while in law school.[28] That observation does not prove that it is the absence of "coverage" that has handicapped these students on the bar but the absence of the demands on academic skills development that these courses may present. Research has pointed

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[21] MARC S. SCHWARTZ, ET. AL., DEPTH VERSUS BREADTH: HOW CONTENT COVERAGE IN HIGH SCHOOL SCIENCE COURSES RELATES TO LATER SUCCESS IN COLLEGE SCIENCE COURSEWORK (2008).
[22] *Id* at 819.
[23] *Id.* at 820.
[24] I. Jon Russell, et. al., *Effects of Lecture Information Density on Medical Student Achievement*, 59 J. MED. EDUC. 881-882 (1984).
[25] *Id*. at 888.
[26] *Society of American Law Teachers Statement on the Bar Exam,* 52 J. LEGAL EDUC. 446, 446 (2002). See also, *Tamara Lawson, Teaching Civil Rights: Mainstreaming Civil Rights in the Law School Curriculum: Criminal Law and Criminal Procedure*, 54 ST. LOUIS L.J. 837, 840 (2010)("A reality of teaching required courses is that they are subjects tested on the bar exam, and towards that end, coverage is a legitimate concern").
[27] "Although law school professionals routinely advise students to take bar-tested courses, there does not appear to be any statistically verifiable support for the practice." Denise Riebe, *A Bar Review for Law Schools: Getting Students on Board to Pass Their Bar Exams,* 45 BRANDEIS L.J. 269, 344, n. 307 (2007).
[28] *Id.* at 344, n. 309 (collecting reports from academic support professionals at several schools).

to few factors that can significantly predict bar passage, but the most consistent factor identified has been law school grades.[29] That this correlation is significant even based on first-year grades, indicates that it is not the substantive knowledge advantage, but the acquired skills of disciplined study, legal reasoning, and legal writing (especially in the context of final examinations), that make the difference on bar exams. Professors who routinely work with bar applicants, and especially bar repeat takers, testify to the principle that "A school need not design a curriculum around the specific topics tested on the bar exam…. Learning to think like a lawyer is the key to passing the bar."[30]

The objection regarding coverage, then, resolves itself in recognizing that one must always necessarily choose to forgo some breadth if one wishes to set learning outcomes at a level of proficiency above mere rote learning. Can you not conceive of a particular case, statute, doctrine or theory that could occupy your entire student's learning for fourteen weeks if you set the level of expected proficiency high enough? Is there a course in the curriculum for which all the doctrine, rules, policies and context could be covered—even in cursory fashion—in fourteen weeks? For deep and transferable learning, for developing collaborative and independent learners, we must aim for higher levels of proficiency, which requires thoughtful choices about the knowledge and skills in using that knowledge for which we desire that proficiency.

As a practical matter, many of us choose a proficiency goal for student learning that allows us to land somewhere in between becoming experts on the minutiae and becoming acquainted with the field. We may choose to dig deep on one topic in the course but provide a cursory survey of others. But if we have chosen a theme carefully, we find these choices of depth and breadth become less troublesome. Planned carefully, learning can re-emphasize and develop a thematic understanding while surveying a diverse and broad range of topics.

C. Think of the Students

Just as expectations management is important in representing clients, so too it is important that you understand your student's expectations, abilities, and preferences in planning learning outcomes. If you don't talk to your students ahead of time about the outcomes you have for the course and give due respect to their own expectations, you may simply be leading where they do not want to follow. Be realistic about how much time and effort both you and the students can bring to the learning task.

My own experience is that students come to my course with two primary learning goals: they want to learn enough to pass the Multi-state Professional Responsibility Exam and they

[29] Stephen P. Klein, *Disparities in Bar Exam Passing Rates Among Racial/Ethnic Groups: Their Size, Source, and Implications,* 16 J. MARSHALL L. REV. 517, 523 (1991).
[30] Suzanne Darrow-Kleinhaus, *A Response to the Society of American Law Teachers Statement on the Bar Exam*, 54 J. LEGAL EDUC. 442, 452 (2004).

want to learn enough to keep from getting disbarred. Yet they often come to the course with a notion that a course in legal ethics is one that is basically contentless—a bunch of sermonizing about a professional ideal from ages past—or that its content boils down to "everything I need to know about legal ethics I learned in kindergarten." I cannot ignore their fears or distrust in planning the course. I cannot say to them "This is not a bar review course!" as though they will all nod and sagely agree that such an expenditure of their tuition dollars would be a waste of time. I cannot begin to lecture about the "values of the profession" from a vantage point that is lacks both humility and realism about the many ways in which "values" are a cover for market protection. I must acknowledge their fears and honor their diverse experiences and viewpoints. But that doesn't mean I have to turn the course into an MPRE course or refrain from exploring difficult issues of values, ethics, politics and emotion. Just like clients come to attorneys with unrealistic expectations that require a conversation and reality check, so too may our students. But you will not know unless you ask.

One problem in teaching Professional Responsibility, no matter what the learning goals, is generating student motivation to achieve these goals. For at least some law schools, the student response to Professional Responsibility is less enthusiastic than for other courses. I believe that an important aspect of that motivational problem is the tension between the learning goals of the students and the teaching goals of the faculty. I try to address that tension before the course begins by communicating with the students with a letter of introduction and a survey of the students.

Sample Letter of Introduction

Dear Students of Professional Responsibility,

It's hard to believe that school begins [next week/in two weeks]! I am looking forward to working with you in Professional Responsibility this semester. There is a tremendous amount of doctrine and practice skills to be mastered in this course in only [X] weeks, so we will need to be as efficient as possible. With that in mind, before the first class, please do the following:

1. Sign on

Sign onto the course web page [Address/Course title/Instructions]. Look around on the site and familiarize yourself with its set-up. Read everything that is under the section [Syllabus & Policies].

2. Introduce yourself

Please go to [URL of your survey] and complete the short survey there. Please do so as soon as possible but no later than [deadline].

3. Make sure you have your course materials

Barbara Glesner Fines, Professional Responsibility (CAP 2012) ISBN: 978-1-59460-650-2. The text is available through [your bookstore] or online from Carolina Academic Press (http://www.cap-press.com) or other online booksellers.
[Description of other course materials]
4. Prepare for our first class
In our first class, we will [first-day's assignment]
I look forward to seeing you all [Date of first class] in [Room X].
Sincerely,

Text of Survey Monkey Survey

[Name and contact information]

1. Please enter your first and last name. If your name is given to being pronounced wrong, please give me a hint (phonetic spelling, "rhymes with", etc.)

2. Which year of school will you be in this semester?
   - Second year
   - Third year
   - Hard to say, I'm a flex student

3. Have you had any experience working in a legal setting (firm, court, agency, clinic, etc.) BEFORE ATTENDING law school?
   - Yes
   - No

If yes, please briefly describe:

4. Have you had any experience working in a legal setting (firm, court, agency, clinic, etc.) DURING law school?
   - Yes
   - No

If yes, please briefly describe:

5. Do you hope to practice law upon graduation?
   - Yes
   - No

If no, what do you plan to do with your law degree?

6. Which type of practice appeals to you more?
   - A planning (e.g., transactional) practice

- A dispute resolution (e.g., litigation) practice

7. Which client group would you prefer to represent?
   - Individuals
   - Corporations and other business (or nonprofit) entities
   - Government entities

8. Check up to THREE fields of law in which you would most prefer to practice:
   - Bankruptcy
   - Civil rights/ Constitutional Law
   - Corporate and securities (including business planning)
   - Criminal law (Prosecution)
   - Criminal law (Defense)
   - Employment and labor law
   - Environmental law
   - Estates and Trusts
   - Family Law (including juvenile)
   - Health law
   - Immigration
   - Intellectual property
   - International law
   - Land use planning and real estate
   - General litigation (primarily plaintiff representation)
   - General litigation (primarily defense)
   - Sports and entertainment
   - Taxation
   - Other (please describe)

9. In what setting would you most like to practice?
   - Medium to large private law firm (over 10 attorneys)
   - Small firm (2-10 attorneys)
   - Solo practice
   - Government agency
   - In-house counsel
   - Legislative representative
   - Other (please describe)

10. Do you have a particular need to sit in a particular part of the classroom?[31]
    - No
    - Yes, I need to sit in the front row or very near the front
    - Yes, I need to sit at the end of a row
    - Yes, I need to sit in a wheelchair accessible spot
    - Yes, I need to sit in another place in the classroom (please describe)

11. What are your learning goals for this course?

The distribution of answers on the learning objectives question varies from semester to semester (often as a product of the relative percentage of second or third-year students in the class), but in general I find that student responses divide into three basic categories: One or two students will admit that they have no learning goal—that they are simply taking the class because they have to and they want only to pass it. A small percentage (10-30%) of the class state short-term learning goals related to extrinsic standards (getting an A, passing the MPRE). I have had as many as 10% of the students state that passing the MPRE is their only learning goal. A fairly sizable group of students (40-60%) will phrase their learning goal as "to stay out of trouble" (avoid getting disbarred, avoid malpractice, etc.) A slightly smaller percentage (30-50%) will mention a desire to learn for excellence or highly ethical practice. A few students will identify a particular issue of interest to them (how to deal with conflicts of interest being a very common one).

During the first class, I share these results with the students. I note that we agree on many of the learning goals for the course. I emphasize that I too want them to pass the course and the MPRE, but suggest that neither of these are difficult hurdles and that they can all accomplish this learning goal with a bit of self-discipline and attention to monitoring their own learning. I expressly including multiple choice exam questions and a guide to study and preparation for the MPRE in the text for their use but that I will not be taking much class time to coach them on those parts of the law governing lawyers that is easy enough for them to master on their own. Through this approach, I hope to meet the immediate learning goals of students for mastery of "black letter" and, at a minimum, remove a motivational "distraction" from the core of the class, while showing the respect for student needs that creates an atmosphere of trust.

I emphasize that I share with the majority of the class their desire to use the course as a learning opportunity that will help them in practice—whether to avoid getting into trouble or to become excellent and ethical attorneys. That all sounds well and good, but including skills and values goals in the course requires learning time in and out of class. I can't do justice to my core

[31] Because I assign students to teams, they do not have a choice of seating. This question allows me to insure that students who have a particular need to sit somewhere in the classroom will be given first choice of seating for their team.

goals for the course and also expect students to master the entirety of the Model Rules of Professional Conduct, much less that vast array of statutes, administrative regulations, common law doctrines and court rules that regulate attorney conduct. I have to ask myself what is core and what is nice to know but not critical to the core. The answer is that a class and a half is devoted to a client interviewing and counseling simulation rather than the 5 or 10 minutes it would take to lecture on the content of Rule 1.4's requirement of communication. A portion of several classes are devoted to research methods and materials, with exercises for the students to complete out of class, which I then must review and critique. In exchange, the whole of attorney advertising and solicitation is relegated to one class, as is trial tactics, while judicial ethics are cut entirely.

Do I worry about what I don't "cover"? Sure—but however important the ideas that I don't address might be, they are not as important as having all the students ultimately arrive at the destination we have set out to reach.

Once you have chosen some goals and levels of proficiency that develop your overall theme, you must state those goals in concrete, measurable terms—what will you see and hear that will let you know the students have achieved the desired learning? It is very easy to say that you want the students to "know the law" or "be able to communicate clearly"—but those generalized goals are not likely to guide you in developing activities and assessments. Aim for statements of objectives that the students themselves will be able to use to assess whether they are achieving. Often it is helpful to frame your objectives as questions you want students to be able to answer at the end of the course.

D. Make Outcomes Count

Once we have established our outcomes, we must design assessments if we want those outcomes to count. "Assessment methods and requirements probably have a greater influence on how and what students learn than any other single factor. This influence may well be of greater importance than the impact of teaching materials."[32] However, we are often inclined to skip the step of planning assessments and move from our declaration of a destination to hop in the car and head off in our caravan. But how will we know whether our students are coming along with us? This is what assessment is all about. There's a lot of talk these days about outcomes assessment in law school and I think a lot of misunderstanding about what that means, but in the end, it's really nothing more or less than knowing whether our students are learning what we

[32] ROY STUCKEY, ET. AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND ROADMAP 175 (2007)(quoting ALISON BONE, NATIONAL CENTRE FOR LEGAL EDUCATION, ENSURING SUCCESSFUL ASSESSMENT 3 (Roger Burridge & Tracey Varnava eds., 1999),available at http://www.ukcle.ac.uk/resources/assessment/bone.pdf.

want them to learn and using that information to improve our teaching. Outcomes assessment doesn't mean the ABA or the bar or even the law school faculty need to decide out destinations or that we all have to agree on the same destination. What we do need to agree on is where we want our students to go and how we will know if they get there.

This requires a subtle but important shift in our thinking as we plan each class. Instead of asking "what will we do today?" we ask ourselves "how will I and the students know what they have learned?" Grant Wiggins and Jay McTighe provide us a useful comparison by contrasting thinking like an assessor with thinking like an activity designer.[33]

Thinking Like an Assessor	Thinking Like an Activity Designer
What would be sufficient & revealing evidence of understanding	What would be interesting and engaging activities on this topic?
What performance tasks must anchor the unit and focus the instructional work?	What resources and materials are available on this topic?
How will I be able to distinguish between those who really understand and those who don't (though they may seem to)?	What will students be doing in and out of class? What assignments will be given?
Against what criteria will I distinguish work?	How will I give students a grade (and justify it)?
What misunderstandings are likely? How will I check for those?	Did the activities work? Why or why not?

Assessment is an on-going process. Often when faculty hear "assessment" they think "final exam"—but that form of assessment (termed in the educational literature "summative assessment") is too late. The other form of assessment (which is called "formative assessment" in the educational literature) is designed to help both the professor and the student determine where the student is on their learning journey in time to make course corrections. Apart from skills-focused classes such as legal writing or clinic course, most law school classes provide little formal assessment of student learning while that learning is taking place. In most law school classrooms, the ongoing assessment of learning is limited to an informal process of observation in the day-to-day classroom teaching. This is valuable, no doubt, but is not nearly reliable or sufficient enough to truly generate learning gains.

We know from decades of research about learning at every level that frequent, timely and focused assessment is critical to improving student learning. Frequent assessment can also result in metacognitive gains, as students develop the skills for self-assessment of learning. As awareness of learning motivates further learning, a cycle of success can increase student learning in sometimes dramatic fashion. While most faculty are aware of the need for frequent feedback

[33] WIGGINS AND MCTIGHE, *supra* note 11 at 68.

to improve student learning, what faculty sometimes recognize only intuitively is that they too need frequent and timely feedback on student learning in order to improve their teaching.

So how do you undertake this formative assessment throughout the semester without taking home a pile of bluebooks every week? (Not that critiquing a pile of bluebooks every week wouldn't result in some significant learning gains, but one must respect one own limits and those of the students. If a professor is too ambitious in assessment activities, they will set themselves up for failure and the students for frustration.)

To design assessments, first choose what you want to assess. Hopefully you will be motivated by your core themes to choose to assess aspects of learning that are critical to that core. The key here is to choose a very specific context and very specific information you want to gather about student learning. In a professional responsibility class, assessing whether students understand conflicts of interest is not the kind of assessment one can undertake in a single classroom assessment. One can, however, determine whether students can articulate the "same or substantially related" test or explain a conflict that would exist if two individuals were current clients that would not exist if the representation of one of those clients had ended.

After a specific outcome is identified, choose a method for assessing learning. There are many methods of obtaining that feedback on student learning throughout the semester that can provide students feedback and inform your own teaching. Thomas Angelo and K. Patricia Cross in their book Classroom Assessment Techniques[34] provide a host of useful devices for gaining information about student learning. The techniques those authors gathered shared several characteristics: "learner-centered, teacher-directed, mutually beneficial, formative, context-specific, ongoing and firmly rooted in good practice."[35]

Throughout the teacher's manual, I suggest a number of assessment techniques that can provide important information about student progress in achieving the learning outcomes I have set for a course.

The final step in the assessment process is to use the data one gains from assessment to improve learning. Sometimes the very process of assessment provides the critical feedback that helps students learn. In other instances, assessment reveals fundamental misunderstandings that will take more concerted effort by both teacher and student to correct. In either case, if faculty do not critically examine their assessment data and use it to either reconsider learning outcomes or restructure learning activities, the entire point of the assessment process is lost.

[34] THOMAS ANGELO AND K. PATRICIA CROSS, CLASSROOM ASSESSMENT TECHNIQUES (2d Ed., Jossey-Bass 1993).
[35] Id. at 4.

II. An Overview of Learning Outcomes in this Text

In the text, I have provided learning outcomes for the course, each unit, and each chapter. Those outcomes can be divided into the following broad categories of learning goals:

- Reading and Analyzing Lawyer Regulation
- Researching Issues in Professional Responsibility
- Formation of Professional Identity
- Practice Management
- Communications Skills

Even if you agree with me in the choices I have made about outcomes to emphasize, your students need to understand your perspective on these outcomes and the priorities you place on each of these. It is even more important if you decide that some of the learning outcomes are not ones you will focus on in designing your course or if you have different or additional learning outcomes. In this manual, I will point out how each chapter's reading specifically links to those outcomes and I make suggestions for learning activities and assessments directed toward these outcomes. In this part, I provide a general overview of why I have chosen these categories of outcomes and how those choices affect my teaching.

A. Reading and Analyzing Lawyer Regulation

Doctrinal content is an important learning goal in nearly all law school courses, as are the analytical skills to work with that content. However, faculty and students might differ in their expectations of content outcomes. Law students are predominantly practical and positivist: they want to know what the law is and how they will use it. They especially want to know what they need to know in order to perform well on a final exam. Law professors are often philosophical and realist: they want students to learn, not only what the law is, but how to discover that law from primary sources and how to think about what the law might be and why.

That tension between rote learning of "black letter" and critical, theoretical analysis of doctrines is exacerbated in Professional Responsibility because of the looming presence of the Multi-state Professional Responsibility Examination. Since the MPRE can test only those areas of regulation that have relatively clear and consistent answers, students want to direct their energies toward mastery of those topics. Many faculty members find these topics the least interesting and important aspects of the course. Of course that tension is present in any course subject to bar examination. However, unlike the bar exam to which students direct their energies primarily after graduation, students often take the MPRE during law school. Bar review courses and the students' own experience teaches them that the most efficient way to master content is

not to work from the original sources but to study pre-digested summaries of the law: transforming challenging exercises in critical reading and analysis into rote learning.

Thus, teachers of Professional Responsibility want students to read the rules, master the vocabulary, structure and content, yes, but concentrate on the difficult and evolving aspects. I have three suggestions to address this tension in the conception of what it means to "learn a subject."

First, as previously mentioned, if you want students to learn something, find out whether they are learning it—assess student learning regularly and often.

Second, give the students an opportunity to be efficient in studying the easy parts. To the extent that students can satisfy independently their need to prepare for the MPRE and to identify and master those relatively stable areas of the law of lawyering, the course and class time can be used to explore the more challenging (and interesting) questions. In the textbook, I provide sample multiple choice questions and a guide to preparing for the MPRE. Encourage students to enroll in a bar preparation course for the MPRE or provide a review course yourself. Give suggestions for good outlines for study of the basic rules. Many of our colleagues in the field have authored these supplemental guides. I do not suggest any particular one to students. Rather I suggest that students use the following guidelines in choosing a study guide:

- Pay attention to the expertise of the author. Study guides authored by faculty are less likely to contain errors as the product of trying to over-simplify complex topics.
- Consider your own best approach to learning. Some people learn well by reading summaries (so a nutshell or "Examples & Explanations" might work best for them. Others appreciate the more global view provided by an outline format with graphics (as one finds in many of the "outline" supplements). A smaller number of students learn well by listening to podcasts or other audio summaries. The interactivity of flash cards might be best for others.
- Whatever the supplement, be strategic in your use of it. Some subjects are easily learned from a summary—especially if you are interested only in learning enough to pass a multiple choice test. Others require more work to truly make the concepts your own. In other words, use a supplement as it is intended: as *a supplement*.

Third, systematically counter the lesson taught by the MPRE that professional responsibility is all about the ABA Model Rules of Professional Conduct. I want the students to leave this course thinking of the regulation of the legal profession as "consumer protection plus" and to develop the habit of thinking of the impact of their choices not simply from an MPRE "subject to discipline" perspective or even from a consumer protection standpoint but from the perspective of their clients, the courts, and the public, with a clear sense of the multiple sources of law that might impact their choices.

B. Formation of Professional Identity

One aspect of Professional Responsibility that makes teaching difficult is the very personal nature of the decisions to be made. The ethical or regulatory dilemmas students face are their own, not those of clients. This course, more so than other doctrinal classes, forces students to face the immensity of the power and responsibility they soon will be granted. Students must learn to recognize and articulate their own "default positions" on ethical dilemmas and also to understand the perspectives of others.

I try to early on address two opposing misconceptions that many students have about the ethical decision-making aspects of the course. Some students believe that if they are good, moral people, they won't have any disciplinary problems. This "good heart-empty head" syndrome can be very hard to dislodge unless these students are confronted with a number of examples of rules that require role-differentiated behavior or examples of attorneys who have faced serious consequences from paying too little attention to the regulatory aspects of professional responsibility. At the other end of the spectrum are those students who are uncomfortable with exercising any personal discretion or moral decision-making or view discussions of these decisions as outside the scope of an academic course. Especially for younger students or those who have never had significant positions of power or responsibility for others, the prospect of exercising "independent professional judgment" can be terrifying.

I believe, as I think many teachers of Professional Responsibility do, that a central learning goal of the course should that students improve their ability to exercise sound practical judgment guided by personal moral or ethical standards and to articulate this decision-making process. However, as with many learning outcomes that aim toward formation of professional identity rather than mastery of doctrinal content, the challenges are in assessing the quality of this decision-making and in designing effective learning activities. Providing opportunities for students to see that their own perspectives are shared by others, generating discussion in small classes (or small groups in large classes), and engaging students in personal reflection in writing can all create a safe environment for student to develop and share the products of their practical, ethical reasoning. Not only do these learning activities help students develop professional judgment, they also further other learning outcomes related to the development of professional identity. I hope that through these exercises, they will increasingly recognize the value of personal reflection and collaborative work in addressing issues of professional responsibility.

C. Researching Issues in Professional Responsibility ⓘ

Improving legal research skills is an additional skills-focused learning goal that I find especially appropriate for the professional responsibility course. Learning outcomes designed to improve research skills are practical and my students have consistently responded favorably to these assignments.

An explicit attention to improving research skills in Professional Responsibility not only improves research skills overall but also helps to address the learning goal that students will recognize the degree to which law is heavily regulated and that "doing the right thing" is not sufficient to avoid trouble.

For more guidance on incorporating research instruction into the course, see Appendix B.

D. Practice Management and Communication Skills 1 💬

I also incorporate some practical strategies for avoiding common professional pitfalls by providing learning activities that engage students in risk assessment and a range of office management practices, especially involving effective written and oral communication. I incorporate these skills goals at an "introduction" level of mastery—an entire course can be built around any one of these skills and there are limits to the authenticity of classroom simulations that make it unrealistic to expect significant learning gains in these objectives. Nonetheless, I think incorporating these outcomes only supports—rather than competes with—the other learning goals for the course. Student learning is much deeper if students are learning in the context of actual practice.[36] If I want students to transfer their learning of restrictions on fee arrangements, for example, the students will learn more deeply and connect their learning to practice (rather than just the final exam) if they have the experience of actually explaining fees to a client (even if simulated) or spotting issues in an actual fee agreement (rather than a narrative exam question).

[36] "[A]ssessment composed of performance tasks and activities designed to simulate or replicate important real-world challenges. The heart of authentic assessment is realistic performance-based testing—asking the student to use knowledge in real-world ways, with genuine purposes, audiences, and situational variables. Thus, the context of the assessment, not just the task itself and whether it is performance-based or hands-on, is what makes the work authentic (e.g. the "messiness" of the problem, ability to seek feedback and revise access to appropriate resources). Authentic assessments are meant to do more than "test": they should teach students (and teachers) what the "doing" of a subject looks like and what kinds of performance challenges are actually considered most important in a field or profession. The tasks are chosen because they are representative of essential questions or challenges facing practitioners in the field." WIGGINS & MCTIGHE, *supra* note 11 at 337-38.

E. Grades and Learning Outcomes

Students need frequent and meaningful feedback on their progress toward learning outcomes, but not necessarily frequent and multiple grades. Nonetheless, I have found that assigning even nominal points to multiple assignments throughout the semester reinforces constituent student effort and attention. This also allows assessment and weighting toward grades of multiple learning outcomes. Some student progress on learning outcomes is easily measured through testing and can be assigned distributed grades. Testing knowledge, research and analytical skills are among these learning outcomes assessed through testing or written assignments. Others learning outcomes—particularly those related to development of professional identify—are more difficult to translate into graded activities, but if we place a high priority on those outcomes, then our assignments and assessments should all reflect that priority. Because of this, I do assign some grade value to journaling essays, drafting exercises, and other professional skills and identity assessments. Moreover, especially in the professional responsibility class, I want to emphasize the importance of sustained effort and de-emphasize the high-stakes, time-pressured end of semester exam as the sole measure of a student's achievement.

Regardless of whether you assign grades to many or few assignments or tests, for grades to provide students with meaningful feedback about their learning, the grades must reference defined criteria that describe and differentiate student achievement of the knowledge and skills objectives being tested on each question or portion of a question. Likewise, ungraded formative assessment activities are valuable only to the extent students can understand how to improve their learning as a consequence of these assessments. For this reason, I have provided grading rubrics for many of the assignments in the text for you to use in providing feedback to students. Providing students these rubrics ahead of time insures that students understand the criteria by which their work will be assessed. This facilitates student self-assessment.

Of course, in deciding how you will assign grades in your course, you will need to consider any institutional restraints on grading practices. Does your school require a particular form of grade evaluation (types of testing, grade distributions, etc.)? Do all components of a course grade have to be anonymous? Can class attendance, participation or other "effort" factors be included in course grades?

III. Teaching and Assessment Strategies in Professional Responsibility

I provide a variety of teaching methods for various materials throughout the text. Variation in methods reaches the entire class. "Teachers who rely on only one teaching method must always expect a hard core of resisters who are unsympathetic to or intimidated by the approach concerned." DONALD A. BLIGH, WHAT'S THE USE OF LECTURES? 152 (2000).

However, law students need clear structure and predictability, so variations in teaching methods should be announced well in advance. Here I provide a general overview of some of the teaching strategies I use in the course.

A. Socratic Dialogue and Discussion

Along with pure lecture, the overwhelming majority of law school classes are taught by a dialogue method.[37] The traditional dialogue and discussion method works well in Professional Responsibility, especially for problem reasoning and policies debates. Faculty can obtain a good deal of assessment information about the student or students participating in the dialogue, though the validity of that information may depend on the student's response to the stress of "the hot seat." Given the pervasive use of this teaching technique, it would seem that time spent in developing dialogue as assessment would be most productive.

Classroom dialogue about ethical stances must be handled much more carefully than less personal discussions. For those whose perceive the class as marginalizing their viewpoint, these discussions can be felt as illegitimate at best and oppressive at worst. Even if students are confident with their own views, some students are simply shy about publicly discussing their personal ethical decisions, especially when asked to do so in response to a question posed in a large classroom setting. This leaves the discussion in the hands of those students who are glib, doctrinaire, or fearless enough to speak.

I have found it especially useful to regularly introduce larger questions by asking students to first think about the question for 30-60 seconds and jot down some notes, then turn to the person next to them and discuss their answers briefly, before I call on students to respond in the classroom as a whole. This "think-pair-share" approach provides introverted students the opportunity to process questions in their preferred mode, engages the entire class in discussion, and makes the whole class dialogue richer and more efficient overall.

A brief discussion early on in the course about "ground rules" for civil disagreement can be helpful. This discussion can be framed as an important issue of professional responsibility and can provide a basis for later "reminders" as necessary to guide discussion within respectful boundaries. Because I teach using team-based learning, I rely heavily on small group dialogue as a learning activity to engage students in exercising and articulating their professional judgment. One of the first exercises for the student teams is to generate a set of rules of professional conduct for their group. To "seed" the discussion of how to handle discussions within the group, I provide the students some of the research on effectiveness of learning groups. I especially point out that the two of the most significant factors in the effectiveness of a learning group are diversity and conflict management. Because my students are in the same team the entire

[37] Steven I. Friedland , *How We Teach: A Survey Of Teaching Techniques In American Law Schools,* 20 SEATTLE U. L. REV. 1 (1996).

semester, they have the opportunity to build trust that permits free dialogue on matters of professional discretion.

Some faculty report effective use of online discussion lists for building these peer dialogues. Students post their own responses to problems or questions posed by the faculty member or by fellow students. These shared reflections can have several advantages. First, students can respond in as glib or carefully considered a fashion as their personality prefers. This opens up the discussion to students who would not otherwise respond in class because they need time to ponder before they feel comfortable talking. Second, students can respond whenever they wish—opening the discussion to those students whose brains don't function in the hour after lunch at which your class is scheduled. Third, students respond in writing. This opens up discussion to those students who are more comfortable articulating their ideas in writing and also adds the tone of precision that written discussion often encourages. Fourth, students respond to each other. We are all familiar with the classroom phenomenon of a "discussion" in which all communication flows through the faculty member. In computerized discussions, given some time and freedom, students will provide feedback to one another than can be just as powerful as faculty feedback.

Both peer-based teaching and computerized discussion groups can create a truly collaborative learning environment, if the faculty member sets the tone, helps students establish ground rules, and facilitates without undue control.

B. Polling

One problem with dialogue as assessment is that it only assesses the learning of those students participating in the dialogue. To gather information about the learning of the class as a whole, we need to find a way to broaden the dialogue. One easy way to broaden dialogue is to simply poll the class. Audience response systems (clickers) are especially useful for this assessment technique because they provide immediate data which you can also save and compare to the data from assessments of that same learning outcome at a later date in order to measure progress. However, the same can be accomplished by simply counting hands.

An effective way to engage students in a discussion of the materials in class is to conduct a brief opinion poll. Asking students to use raised hands to vote for various options is an efficient mechanism for polling but it has significant drawbacks. First, in Professional Responsibility, students are sometimes reluctant to vote "against the crowd" for fear that their choice might be perceived as "unethical" and so they will either wait to see how others are voting and then join in or they will not vote at all. Since students do not all vote simultaneously, it is difficult to know who is participating in the poll and who is not.

For this reason, I prefer simultaneous reporting mechanism. Technology is increasingly easy to use for this. If you teach at a CALI member school (the majority of law schools), you can

use CALI's InstaPoll polling website (www.cali.org/content/cali-instapoll). Have students bring their laptop, tablet, or smart phone to class, and log into the CALI website and vote. The advantage of this method is that you can poll at any time you want, even without having pre-prepared questions. Some clicker technology provides a similar functionality. Technology allows you to gather and retain data quickly (without having to count hands for example). Moreover, because a student's answer is not visible to other students, this anonymity can help to facilitate broad expressions of opinion. When students see that 30% of the class shares their views, they are less reluctant to join in discussion and those who would criticize their views are less able to dismiss their opinions.

The disadvantage is that you need all the students to have and be able to use technology in the classroom. The low-tech version I use is to provide all students "voting cards" at the beginning of the semester. These are four different colored 4 x 11 pieces of cardstock with a letter (A-D) on one side and an answer (Yes, No, Unsure) on the other side. Students then are asked to simultaneously "vote" by raising the card with the answer they have chosen. This allows you to assess at a glance the distribution of opinion in the room and also to identify students who are not participating. This can allow you to direct conversation to reflect varied opinions in the classroom and support minority opinions in order to generate discussion.

You can also use polling to test student understanding rather than surveying opinion. You can use immediately the information you get from these polls to tailor the class to the level of student learning. If the vast majority of the class answers correctly, you can simply provide a brief explanation and then move on. If, however, the majority of the class is incorrect, you can backtrack, address the misconception (to an audience whose attention has been sharpened by being "wrong") and then move forward again. If the class is divided, you can also provide explanation and move ahead or, for more active learning for all participants, ask students to turn to someone who gave a different answer and convince that person of the "correct" response. The ensuing dialogue will, often as not, replicate the one-on-one dialogue you would be having with the student who did not understand.

C. Quizzes

I make suggestions throughout the manual for a number of classroom assessment techniques that permit you to gather data on student learning from the entire class and permit students to gauge their progress in mastering the material. Short multiple choice or short-answer quizzes can be powerful tools for assessing and promoting student learning and improving the quality of teaching. So long as the quizzes do not count for the final grade (or count only a minimal amount) students appreciate the clear, timely feedback these quizzes can provide. Students also appreciate quizzes occasionally as a reinforcement of their study for the MPRE.

Since most students are comfortable with quizzes, they require less introduction and meet with less student resistance than other methods might. Quizzes can be used to assess student's

background knowledge or understanding in order to plan approaches to lessons, to establish a baseline to measure student learning, and to assess student understanding. They can also serve a number of purposes beyond assessment, such as guiding student learning and discussion of a subject, setting up class discussion, or reviewing materials already learned. Quizzes can, of course, be part of summative evaluation process as well.

Quizzes can be given before class and then reviewed in class, but there is independent learning value in using an in-class, closed book quiz to force students to recall information and apply reasoning. I most often use individual quizzes as out-of-class assessment devices, rather than taking class time. If one provides students with quizzes that permit students to self-assess their mastery of basic concepts and vocabulary, class time can be turned toward learning activities for which face-to-face meeting is more critical: simulations and practice of lawyering skills or creative and exploratory dialogue and debate for example. For example, rather than spend class time in Professional Responsibility on doctrinal details of admission to practice, I assign my CALI lesson on the subject, which provides interactive opportunities for students to test their understanding.[38] I then spend class time on an interviewing exercise in which the students conduct an interview of a law student who has been denied permission to take the bar examination.[39]

A second assessment device straight from the halls of elementary and secondary schools is the worksheet. I find worksheets can be especially useful tools for focusing student attention on the most difficult parts of a doctrine or for gathering perceptions about skills exercises. I assign the worksheets for students to bring to class. During class, I ask students to compare their answers with those of the students sitting in their area, so students get one level of feedback through this peer review process. I then go over the answers with the students. I gather data on how the students performed by either collecting the worksheets or, less precisely, by simply monitoring the number and types of questions that students raise after reviewing the worksheet. Not all assessment requires that faculty gather the data on learning—students can monitor their own learning as well.

D. Graphics

Often in mastering any particular area of law, students are most confused by the need to find the appropriate organization or categorization for doctrines. Assessment devices can be specifically geared toward viewing student's "maps" of a subject. You can ask students to sketch a flowchart of a concept or you can provide students structures for them to fill in. To make the assessment device efficient, you should focus on content or structure but not both.

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[38] Barbara Glesner Fines, *The Law Governing Admission to Practice Law*, (2010) at http://beta.cali.org/ lesson/656.
[39] Barbara Glesner Fines, *Teaching Empathy Through Simulation Exercises - A Guide and Sample Problem Set* (2008) at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1304261.

To use this strategy effectively, you must ask yourself why a structural overview would be useful to the students' learning at this point. Do students need to learn to break down and analyze a rule? Are students losing the "big picture" in the midst of learning a doctrine or concept? Do students need assistance in seeing relationships between ideas? Are the students at the point in their learning that synthesis and condensation of material is critical to their ability to use the information? Obviously, the incomplete outline or graphical map at the end of the semester will be geared more toward synthesis and overview than in-depth analysis and organization of any particular set of ideas.

Earlier in the semester, outlines and graphical maps can help students identify main ideas or see the overall organization of one topic, identify relationships between ideas and rules, or guide the students through a process of problem solving in a particular area of law.

Because graphics rarely test details but rather structures and relationships, it does not take much effort to review these and discover any misconceptions or areas of uncertainty. You can then follow up with additional clarification or design problems against which students can "test" their matrix.

E. Minute Papers

Perhaps the easiest way to assess student learning is simply to ask. Many of the techniques described in educational literature are simply a variation on stopping class for a moment, asking a question, and then having student provide a short written response. Described by Angela & Cross as "The Minute Paper" and introduced to law professors as "Free writes,"[40] the technique has a number of variations depending on the information one is soliciting from the students. To use the technique, the professor simply stops the class and asks students to respond (on an index card or half-sheet of paper) to a limited question.

Minute papers can be used to assess student mastery of rule elements, to discover areas of uncertainty, or simply to get feedback on some aspect of the class. It takes literally only one minute to ask students to write down a question they have about the materials, the most important idea they took from a case or discussion, or a summary of the elements of a rule. The first time I collect a minute paper that is designed to assess student preparation or reading, I will have the students put their names on these responses, as identifying themselves to their work will motivate more preparation in future classes. After that I do not necessarily have students put their names on their responses, as the purpose is to assess the understanding of the class as a whole rather than assess individual responses. I collect these brief summaries and after class sort them into groups according to the degree of understanding reflected. It then takes no more than five minutes after class (in a class of less than 100 students) to sort through the papers and identify

[40] David Dominguez, et. al., *Inclusive Teaching Methods Across The Curriculum: Academic Resource And Law Teachers Tie A Knot At The AALS*, 31 U.S.F. L. REV. 875 (1997).

the themes or assess the levels of mastery. This can then help to focus course planning for the next class period. If I conduct a minute paper during the class period, rather than at the end, I will give the class feedback by providing them with one or two examples of an accurate and complete response. At the beginning of the next class, after I have had a chance to review the response, I report to the class the percentage of the class with complete and accurate responses and I correct any misunderstandings I saw in the statements.

One of my favorite minute papers is to ask students to close their books and write a particularly difficult rule in their own words. I like to use these "state a rule in your own words" minute papers several times during the semester. First, these reinforce the close reading of the rules the text emphasizes. Second, they are an efficient way to assess and reinforce class participation. Third, they model one of the most effective ways to learn: that is, through retrieval practice.[41]

It takes only a moment to sort these questions into the categories of misunderstandings so I know how to follow up with the students but the insights into student learning are very powerful.

F. Simulations

Simulations can be excellent vehicles for teaching both skills and doctrine. The text suggests several, especially those involving client communications, since this is where some of the most critical professional responsibility lessons are put into practice (or not). To get the most value out of simulations, you will need to devote sufficient time to them to teach the students the skill, conduct the simulations, and then provide feedback.

Simulations, like most learning activities, require preparation. Lackadaisical preparation not only makes the exercise a waste of time for their learning but for the learning of their partners as well. If you intend to use a simulation problem, assign the problem and background readings far enough in advance that the students who will be conducting the role play will have time to read and study their problem carefully. Emphasize that students playing roles of clients should know their facts well enough to play their role with credibility. Attorneys should have studied the assigned materials to be comfortable using the law and skills that the simulation is targeting.

Unless your students are already accustomed to role playing exercises, it bears mentioning that the value of these exercises depends in large part on how sincerely the students try to "get into their role." Just as with poor preparation, lackadaisical role playing, in which

[41] See Jeffrey D. Karpicke & Janell R. Blunt, *Retrieval Practice Produces More Learning than Elaborative Studying with Concept Mapping,* 11 SCIENCE 772-775 (February 2011).

students simply recite their role with no effort to truly portray the client or genuinely practice acting as a lawyer, renders these simulations less effective. Even more troublesome is the phenomenon of "caricatured clients." Perhaps because students are fearful of the reality of working with individuals in crisis and seek to distance themselves from that experience or perhaps because students believe that role playing requires "drama," students will often overplay their roles—reflecting the extremes of any client character or emotion. Instructing the students on your expectations for their preparation and performance on the role play will increase the value of the exercise.

There are several choices you have in conducting any simulation:

- Skill or doctrine. Is the primary purpose of the simulation to teach the skill involved or to place the doctrine in context in order to better understand the concepts? While any simulation will require both knowledge and skill, if you do not intend to emphasize skills, be sure that you let students know that there is much more to learn about the skill being simulated than you will be focusing on and recommend courses or clinics in your curriculum where they can develop the skill more fully.
- All or some. Do you want your entire class to participate in the simulation or only a few, who will demonstrate the skill for the remainder of the class to observe and comment upon?
- Choose or assign. If only some students will be conducting the simulation, will you accept volunteers or will you assign this role? If all students will be participating, will you allow students to choose their partners or assign partners?
- Roles. In some simulations you have choices to expand or contract the simulation to include more than one attorney or client other characters that might appear in the situation. Remind the students that everyone in a simulation has a role—if only a few students are actually demonstrating the skill, everyone else has the role of observer. If you break up the class into teams to conduct simulations, you can assign an observer to each team. Observers can be given viewpoints from which to observe the simulation—public, judge, client, supervising attorney, etc.
- Students or others. Consider that some roles might be better managed if played by you or by someone from outside of the class. Particularly if you want students to have an experience of working with a stranger, bringing in an outside person to play the role can be effective.
- Inside or outside of class. You can assign the students to conduct role plays on their own time. If so, the role of observer is especially useful, so that the process can be memorialized. If your school has facilities for the students to videotape their simulations, you can require that each group do. For some simulations, in which students are practicing talking to a client about a particular matter (their "scripts"), you can ask students to use the cameras on their laptops and record a brief video and submit for your review. You can then use selected excerpts from these to discuss in class.

- Graded or not. While you certainly should provide as much feedback as you can regarding the exercise, including the exercise as a graded element is much trickier unless you are able to provide more extensive instruction in the relevant before the interview. I have asked students to write a short reports or reflections on the simulations and have graded these, using the same rubric I use for reflections.

G. Incomplete Outlines

For subjects on which I expect students to master doctrinal content, I sometimes lecture (either in a podcast before class or during class). Lectures are an efficient method of conveying information, but not very engaging. Providing the students an incomplete outline to complete can help the students retain their attention and engage them in the reading or lecture. Moreover, this is a method of engaging students that Bar-Bri and other bar review courses use with their lecture series so it can be helpful to students to have some familiarity with the tool.

Be sure that the incomplete outline's structure makes the relative importance of ideas and their relationships to one another clear. Leave enough blanks to keep students engaged throughout the reading or lecture, but not so many that the tool is more trouble than simply taking notes. Choose carefully the blanks left for students to fill in so that knowledge of the doctrine makes it very clear what content should be added to the outline and so that the student's attention is brought to key terms and relationships. Longer is not necessarily better: don't require students to copy long quotations in order to complete the outline. So, for example, sometimes the best blank might not be the elements of a rule, but a blank that requires students to fill in an "and" or "or" between these elements.

H. Jigsaw Puzzle Learning Activities

When there are a variety of topics to cover in a particular class session, no one of which is especially central but all of which add up to a complete picture of the subject, one way to engage all the students in discussing all these topics (and to liven up learning a doctrine) is to divide the students into jigsaw groups. First, divide the students into groups that will each discuss and resolve a different part of an overall problem or a different subset of a doctrine. (For example, I use this approach to review the introductory problem in Chapter 10 on consents to disclosure and waiver of privilege or work product protections) So, for example, you might label each separate part of the problem with letters and a number. Students addressing the first part of the problem, for example, would be A-1, A-2, A-3, A-4. Students addressing the second part would be B-1, B-2 and so forth.

First, have all the students with the same question or problem (all the A's, B's etc.) meet together in a group to discuss their question and arrive at some answers or common

understandings. Students should make sure they all agree on the important points one needs to master. Have each student in the group take notes of their discussion.

Then instruct all the students with #1 to meet together, #2 together, etc. Thus each student will have a different part of the "puzzle" and there should be several groups in which there is at least one representative of each aspect of the problem or doctrine to "teach" their part to their peers.

There are two options in using this "jigsaw" approach. One way is to assign the entire class to read and prepare all aspects of the problem or doctrine and then not divide the students until they come to class. This approach has the virtue of encouraging all students to read all the materials. The disadvantage is that you must take more class time for the students to prepare their presentations.

Another option is to divide the class in an earlier class and assign each group responsibility to prepare outside of class. You can still assign the entire set of materials, but more students will give less attention to the portions of the reading for which they are not going to be held responsible for teaching. If you take this approach, you might consider giving to those groups whose topic does not include a case in the text the assignment to read a case on their subject to deepen their level of "expertise" on the topic.

The major disadvantage of this approach, apart from the fact that students might not read the entire chapter, is that students must prepare together outside of class and are more likely to simply divide up the work or, worse yet, pawn the burden of preparation off on another student in the group. This freeloading problem is the death knell for group work, so I would strongly encourage you to find a way to build in individual accountability if you take this more elaborated approach to the assignment. Asking each student to first submit a summary or outline or case brief, or asking students to work on a wiki where you can trace the history of their collaboration, can help.

I. Peer-Assessed Drafting Exercises—a Checklist Approach

Exposing students to common documents necessary for ethical practice is an important objective of my professional responsibility course. I integrate skills exercises to reinforce the importance of these documents and to place the substantive doctrine in context. The primary learning outcomes are knowledge and attitude (appreciating the importance of written communication and documentation). A very minor learning outcome is that students will gain some familiarity with basic principles of drafting. I do not expect students to achieve a very high level of proficiency in drafting and do not teach more than twenty minutes or so of drafting

basics. Nonetheless, having the students review a document for both substantive content and drafting reinforces both learning outcomes.

Since I do not want to take the time to assess mountains of drafted documents, I instead assess student's knowledge of the substantive doctrine and the principles of drafting by providing the students with a draft of a document with numbered sentences and ask them to work in groups to evaluate the document, using a checklist. I then ask students to report (orally or in writing) the single best and worst parts of the document substantively and as a matter of clear communication. This helps me to identify whether they are able to recognize doctrinal issues in context and whether they have gained an appreciation for the worst of drafting errors.

J. Using CALI lessons

The Center for Computer Assisted Legal Instruction is a non-profit organization of law schools and other institutional members. Among other products, CALI produces interactive lessons on a wide variety of subjects. In the field of Professional Responsibility, I have authored many of these lessons, so students would find CALI lessons to be very compatible with the content of the text. Because CALI lessons are interactive, students can use them to self-assess their mastery of doctrinal content.

If you assign CALI lessons, I strongly encourage you to use the "lesson link" feature of CALI. This function allows you to create a unique URL to send to your students to run a particular CALI lesson and, more importantly, allows you to then see which students have completed the lesson, how long they spent on the lesson, and the scores they received. Read more about this at http://www.cali.org/faq/7819. (Of course, students still must be registered at CALI—if they need help, each school has someone who can help. You can locate your school's CALI password administrator here: http://www.cali.org/contacts.)

K. Using Traditional Final Exams as an Assessment Device[42]

Traditional final exams and papers have a wealth of assessment information for us to mine if we only take the time to gather, reflect and use that information. Many faculty gather holistic impressions as they grade the performance of the students overall and the areas of difficulty and strength. To transform this grading process into systematic assessment, faculty can take a few more simple steps:

Improve your data collection.

[42] This section is reprinted from my blog post "Assessment Tales: The Bluebooks that Stayed" at http://bestpracticeslegaled.albanylawblogs.org/2012/01/17/assessment-tales-the-bluebooks-that-stayed.

Rather than gathering general impressions as we grade bluebooks, we can mine the bluebooks for some more concrete data. Examine the distribution of performance on individual questions or issues. Note that you need not gather every data point possible from the bluebooks. Often it is helpful to begin with two or three items to analyze. For example, what is the one thing that nearly every student did well on the exam? What were the one or two questions/issues/approaches that many students had problems on? What percentage of the students had these problems?

Analyze your data.

For issues students appear to have learned well, look again at your questions. How confident are you that the question truly tested the student understanding? In this respect, essay questions are often easier to evaluate than multiple choice questions, because you can see the students reasoning on the former, whereas consistently correct answers on the latter can be the result of distractors that are patently wrong. What materials and techniques did you use to prepare the students for that question? When during the semester did you teach those matters? If the student performance is improved from prior exam administrations, what, if anything, did you change that may have caused this improved learning?

For issues or questions on which a significant percentage of student performance was deficient, again, begin by reexamining the question, its placement in the examination and the time allocated for responses, to identify other possible reasons for poor performance that are less related to student learning and more related to exam conditions. Look for patterns in the student errors or misconceptions that can help you diagnose what learning conditions led to the student poor performance. What materials and methods did you use to teach this doctrine?

Plan for the next semester:

When students are performing well on a doctrine or concept, especially when that competent performance appears to have been the result of your prior efforts to target and improve learning activities for that material, you may be tempted to rest on your (and your students') laurels. However, consider that any change to one part of a course can affect other parts and each class brings with it different experiences and preparation.

To improve student learning on areas that have presented difficulties for students, consider not only improving teaching materials or methods related to that area, but also incorporate more formative assessments during the term to help you and the students identify earlier and more clearly the learning deficiencies.

What my bluebooks told me this semester:

To illustrate this process of mining bluebooks for assessment, I will discuss this semester's Professional Responsibility exam. From this semester's bluebooks, I gathered a range of data on materials well understood and poorly understood. I will share three examples of data to illustrate the process of using bluebooks for an assessment process.

The doctrinal winner this year in terms of student performance was multijurisdictional practice of law. Is this because the students understood these aspects of the course better than others? Reviewing the exam, I noticed that the question testing this subject called for a fairly low level of mastery (basic issue spotting and knowledge of rule) without any sophisticated analysis required. This was a topic for which I had provided a number of practice problems to the students and I had tested the issue in a similar fashion on a prior year's exam, which I had made available for student review. Moreover, it is a subject that, because my law school is located on a state line, with dramatically different variations on this rule, the students understood that this was a rule that would impact their immediate future, as they chose which state bar exam to take first. What I learned from this is the fairly unremarkable understanding that my law students can and will master at a knowledge-level those topics for which they know they will be tested and for which they also have a more personal motivation to learn well. I concluded that I would and could generalize these understandings to not only raise the bar on testing this doctrine, requiring a more sophisticated understanding, but also would look for other areas in which I could improve student motivation by identifying the specific need-to-know circumstances looming in their immediate future for other rules.

A second topic about which I have been tracking student learning performance for many semesters is the student understanding of the distinction between the evidentiary attorney-client privilege and the ethical duty of confidentiality (among other doctrine). When I first began tracking, as many as 30% of students were demonstrating fundamental confusion on this topic—using language of "privilege" when the subject was confidentiality (or vice versa) or confusing the exceptions to the ethical duty with the crime-fraud exception to privilege. I knew from speaking with other Professional Responsibility teachers that this is a common area of confusion for students. Over the course of several semesters, I worked to improve student learning in this area: including more problems in course materials, writing and assigning a CALI lesson on the subject, and explicitly telling the students that this is something that I am tracking and cheering them on to "make this the 100% mastery year." The efforts are bearing fruit. This semester was the best yet—only four out of 72 students used the vocabulary of the two doctrines improperly and three of these applied the correct rule even though they were not using the correct terminology in doing so.

An area on which I had thought I was making progress in student learning turned out to be a continuing problem. Students commonly are confused by the rule governing an attorney's right to withdraw from representation. I have made the same efforts on this doctrine as I have with the privilege v. confidentiality confusions: increasing problems, providing additional

outside resources (again, I wrote a CALI lesson on the subject); and providing in-class quizzes to assess understandings while there was still time to improve learning. However, I was puzzled to see 13 of the students declare that an attorney may not withdraw from representation if it would harm the client. What could have been the source of this confusion? Searching through my course materials and lesson plans, I uncovered the problem. A PowerPoint lecture on withdrawal from representation when the client fails to pay the attorney contained a page with a bullet point list of reasons that courts might deny an attorney permission to withdraw even though the rules would permit the withdrawal. One of the bullet points listed "degree of harm to the client" as a factor the court would consider. Obviously some students had transferred the PowerPoint slide into their notes on the general withdrawal rule rather than recognize that these factors were connected only to the judicial discretion to deny an otherwise permissible withdrawal. Again, a well-worn lesson learned anew: as helpful as PowerPoint slides can be for organizing discussions and providing visual cues for learning, students will study text of these slides as definitive statements of law rather thumbnails of larger discussions and understandings. Conclusion: no shortcut summary slides!

IV. Course Organization and Schedule

The text is designed to maximize flexibility in course design. You can use any one of the units in any order, mix and match subchapters, and select from among the assignments suggested in the text to create the course that will best match your teaching and your students' learning. I have suggested two syllabi here as suggestions.

A. Two-Credit Hour Course

Here is one suggestion for organizing the 2-credit hour course, meeting in 50-minute periods for 14 weeks, using traditional teaching methods. It covers entirely Units 1-5 on the core attorney-client relationship duties.

	Student Reading Assignments	Teaching Notes & Assignments to consider
1	Chapter One 1.1 Who Are Lawyers and What Do They Do? 1.2 What is a Professional?	Introduction to the class, setting ground rules for your course, and setting the tone for your teaching methods.
2	Chapter Two: What Laws Govern Attorney Conduct? 2.1 What Sources of Law Regulate the Legal Profession?	Discussion of *Riehlman* & *Whitworth* cases

	2.2 What are Rules of Professional Conduct? 2.3 Reading the Rules: Basic Guidelines for Reading a Rule of Professional Conduct Problems for Practice 2.4 What is the Significance of Law as a Self-Regulated Profession?	
3	Researching Professional Responsibility 2-B: Finding Disciplinary Rules 2.5 Obligations under General Law	This is a good class to collaborate with a librarian to teach the students how to research PR. Discuss Preliminary Problems and Researching Professional Responsibility 2-A: Brainstorming Search Terms Assign students to complete: Researching Professional Responsibility 2-C: Professional Guidance in your Practice Area
4	Chapter Three Who Should Be a Lawyer? 3.1 Who admits you to practice law? 3.2 What are the qualifications necessary for admission to practice law? 3.3 Reading the Rules: Connecting Rules to Procedures	If you use the complete interview exercise 3-A: Interviewing a Bar Applicant, you will need two class periods for this subject in order to provide feedback on interviewing and discuss other admissions issues and doctrine, including the Lane case. If you abbreviate the interviewing exercise to a demonstration, you can discuss other aspects of admissions.
5	Chapter Four The Legal Services Industry Preliminary Problem: The New World of Legal Practice 4.1. How is the Practice of Law Changing? 4.2 Where Do You Practice Law? 4.3 Reading the Rules: Rule 5.5 4.4 What Are Some	Rule 5.5 and the *Trester* case are excellent vehicles for reinforcing traditional analytical skills of rule and case analysis in the context of PR. You may wish to focus exclusively on this part of the chapter and leave other issues of future developments for student's background reading or you may wish to devote an additional class for discussions of evolution of the legal profession. If so, you might want to assign all or some of

	Alternative Business Forms For Legal Services Delivery?	Chapter 25.
6	Chapter Five Selecting and Rejecting Clients 5.1 How Do You Form an Attorney-Client Relationship?	This chapter contains some of the more difficult materials for students to master. It also provides excellent opportunities to emphasize practice skills of communication with clients. I nearly always take at least two class periods for this chapter and assign at least one of the skills assignments. Professional Responsibility Skill 5-A: Drafting Non-engagement Letters Researching Professional Responsibility 5-A: Finding Forms
7	5.2 Reading the Rules: Withdrawing from Representation	Rule 1.16 is especially difficult for students to master and bears special attention Professional Responsibility Skill 5-B: Choosing Clients is a good exercise for in-class small group discussions You may wish to follow up by assigning Reflective Practice: Saying Yes, Saying No
8	Chapter Six Providing Competent Lawyering 6.1 Why Do Lawyers Make Mistakes and How Should They Respond? 6.2 Reading the Rules: Rule 1.1—Disciplinary Regulation of Competence 6.3 Regulation of Attorney Competence through Civil Liability 6.4 Other Regulation of Attorney Conduct 6.5 Reading the Rules: Rules 5.1 and 5.2 - Responsibilities to	This chapter contains a broad range of topics addressed at a fairly high degree of generality. One way to select materials for emphasis in this chapter is to ask students what they would most like to learn more about and tailor the class to their interest. Students have responded quite favorably to the “Difficult Conversations” exercise. Some exercises to choose from: Reflective Practice: Thinking about Mistakes Researching Professional Responsibility 6-A: Using Secondary Sources Professional Responsibility Skill 6-A:

	other Attorneys Review Problem 6.6 Beyond Mistake Management and Risk Avoidance	Difficult Conversations Researching Professional Responsibility 6-B: Getting Advice on Your Professional Duty Reflective Practice: Self-Evaluation and Planning for Professional Development
9	Chapter Seven Fees, Files, and Property 7.1 Setting Fees 7.2 Reading the Rules: Rule 1.5 7.3 How Do I Bill Clients? 7.4 Collecting Fees	This chapter always takes at least two class sessions. Students find the entire matter of how to set fees and collect fees very confusing and vague. They are often apprehensive about timekeeping (Exercise 7-A is one they complain about doing when assigned but express that they learn a lot from when it is done) Reflective Practice: Your Relationship with Money Reflective Practice: Your Relationship with Time Professional Responsibility Skill 7-A: Timekeeping
10	7.5 Client Funds and Property 7.6 Communicating About Fees and Property	I teach Rule 1.15 at a rule level only, because it is very difficult to teach client accounting without actual accounts to maintain. I use some time from this second class to review client communication of fees. Professional Responsibility Skill 7-B: Documentation Researching Professional Responsibility 7-A: Fees, Files, and Property
11	Chapter Eight Communication and Authority 8.1 The Scope of Representation 8.2 How are Decisions Allocated Between an Attorney and Client? 8.3 Reading the Rules: Rule 1.4—Communication with Clients	Students sometimes find the "models of the relationship" material very theoretical, but allowing them to see how the differences among these models operate in practice helps them to appreciate their importance. Researching Professional Responsibility 8-A: Using the Restatement as a Research Tool Professional Responsibility Skills 8-A:

	8.4 What are Some Models of the Attorney-Client Relationship? 8.5 Reading the Rules—Revisited: When is a Rule not a Rule?	Explaining the Attorney-Client Relationship Reflective Practice: Your Model of the Attorney-Client Relationship I assign the Unit One Review material for out-of-class review.
12	Chapter Nine Confidentiality, Privilege, And Related Doctrines 9.1 Reading the Rules: Rule 1.6 and the Duty of Confidentiality 9.2 When Must Attorneys or Clients Provide Information in Litigation? 9.3 Comparing and Contrasting Doctrines	I spend the entire class period drilling the differences between privilege, confidentiality and work product doctrine. *In re Anonymous* takes little time and is well worth discussing because it emphasizes the breadth of confidentiality so well. Researching Professional Responsibility 9-A: Rules of Evidence and Procedure
13	Chapter Ten Exceptions to Confidentiality and Privilege Based on Consent and Waiver 10.1 Disclosing Confidential Information to Further the Representation 10.2 Confidentiality, Privilege, and Shared Representations 10.3 Waiver by Inadvertent Disclosure 10.4 Waiver by Placing Matter in Evidence 10.5 Attorney Self-Defense Exceptions	This chapter is a broad "coverage" of a number of issues. You may choose to assign only some portions of this chapter if you wish to examine one or more in depth. Peterson v. Bernardi is especially good for emphasis because the errors were by law students. Reflective Practice: Exercising Judgment Professional Responsibility Skill 10-A: Drafting a Waiver of Confidentiality Researching Professional Responsibility 10-A: Finding Case Law on Professional Responsibility Issues
14	Chapter Eleven Exceptions to Confidentiality Designed to Protect Third Persons Preliminary Problem 11.1 Variations on Exceptions to Confidentiality to Protect Third Persons 11.2 Exceptions to	This class takes two class sessions if you want to help students to read the rule, understand the difficulty of actually applying the exceptions in practice (McClure) and see the relationship between confidentiality and privilege exceptions (Gonzales) as well as explore the policy tensions in these rules.

	Confidentiality for Death or Substantial Bodily Injury	Reflective Practice: Disclosing Client Wrongdoing Researching Professional Responsibility 11-A: Finding Disclosure Requirements
15	11.3 Reading the Rules: Disclosure of Client Frauds 11.4 The Crime-Fraud Exception to Privilege 11.5 Required by Law	If you give midterm examinations, this makes an excellent point at which to do so.
16	Chapter Twelve Confidentiality and the Duty of Candor to the Court 12.1 Reading the Rules: Rule 3.3 Candor to the Tribunal 12.2 Refusing to Offer False Evidence 12.3 Interviewing to Establish Trust and Encourage Candor 12.4 False or Frivolous? Professional Responsibility Skills 12-A: Counseling a Client for Candor Researching Professional Responsibility 12-A: Researching Pleading Sanctions	The state of mind issues in these materials are the most difficult for the students to grapple with. It can be helpful at this point to revisit the *McClure* and compare the state of mind required for withdrawal, discretionary disclosure and mandatory disclosure.
17	Chapter Thirteen Confidentiality and Misrepresentations in Negotiations 13.1 Reading the Rules: Rule 4.1 and the Role of Comments to the Rules 13.2 Consequences of Misrepresentations 13.3 Exploiting an Opponent's Error and Hardball Negotiation	Students will need some help understanding Rule 4.1 and its relationship to Rule 1.6. Roth is a helpful case because students so often do not recognize that lying about insurance coverage is not acceptable. The Backbreak Acres hypothetical provides good practice in problem solving these issues. Professional Responsibility Skills 13-A: Protecting Your Client from Misrepresentations Reflective Practice: Fair Game?
18	Chapter Fourteen Confidentiality and Counseling Compliance	Unit Four Closure This is an excellent place to include a

	14.1 The Lawyer as Gatekeeper 14.2 Reading the Rules: Counseling the Entity Client	role-play so students can experience the difficulty of talking a client out of bad behavior. Researching Professional Responsibility 14-A: Finding Federal Regulations Reflective Practice: Thinking about the Attorney's Public Role
19	Chapter Fifteen Overview of Conflicts of Interest 15.1 Interests and Risks 15.2 Reading the Rules: The General Principles of Conflicts 15.3 Imputed Conflicts 15.4 Common Misconceptions About Conflicts of Interest	This is the one class I find works best through lecture. Helping students see how the entire set of conflicts rules fit together, the underlying core concepts, and how these rules are enforced lays groundwork to be able to cover the rest of the Unit.
20	Chapter Sixteen An Attorney's Own Interests in Conflict with the Client 16.1 Reading the Rules: Attorney-Client Conflicts 16.2 Prohibited Transactions 16.3 Discouraged Transactions 16.4 Professional and Personal Interests	Problems for Review Selecting one problem from each of the three categories of 1.8 for closer examination seems to work better than trying to review each and every category. The most difficult issue for students to master is distinguishing among the lawyer taking an interest in the litigation, the lawyer doing business with the client, and the lawyer charging a contingent fee. Researching Professional Responsibility 15-A: Finding Policies and Purpose Professional Responsibility Skills 16-A: Documenting Transactions with Clients Reflective Practice: Personal and Professional Identity Conflicts
21	Chapter Seventeen Conflicts of Interest and the Problem of Client Identity 17.1 Reading the Rules: Rule 1.18 Prospective Clients 17.2 The Entity Person 17.3 Third-party Payors	This is an excellent chapter in which to use initial client meeting interviews to reinforce both understanding of the doctrine and to further develop the skills of communicating with clients. Professional Responsibility Skill 17-A: Disclaimers and Electronic Communication Researching Professional Responsibility

		17-A: Research Problem
22	Chapter Eighteen Conflicts Among Current Clients 18.1 An Overview of Concurrent Conflicts 18.2 Representing Opposing Parties	This class session can take two classes to truly help students grapple with the fact-intensive nature of conflicts analysis Reflective Practice: Loyalty to a Client Professional Responsibility Skill 18-A: Agreements Concerning Joint Representation
23	18.3 Representing Co-Parties in Litigation 18.4 Representing Multiple Parties in Transactions	
24	Chapter Nineteen The Current Client and a Former Client 19.1 Reading the Rules: Former Client Conflicts 19.2 When is a Client a "Former Client"? 19.2 Substantial Relationships and Confidential Information 19.3 Consents and Waivers of Conflicts 19.4 Reading the Rules: Conflicts and the Former Government Employee	The Same and Substantial Relationship test can be very difficult for students because they expect a more predictable, clear-line test than the rules provide. This class works best by walking students through an example case. Professional Responsibility Skill 19-A: Disengagement Letters Researching Professional Responsibility: Working the Problem Professional Responsibility Skills 19-B: Assessing a Career Path
25	Chapter Twenty Conflicts of Interest and Imputed Disqualification 20.1 Imputed Conflicts and Traveling Attorneys 20.2 Ethical Screens 20.3 Identifying Conflicts	Students are easily confused about the use of screens, confusing what they see in practice, where screening may be used as a tool to secure a client's consent to a conflict beyond that expressly noted by the rules. Professional Responsibility Skill 20-A: Designing a Screen Professional Responsibility Skill 20-B: Drafting New Rules
26-28	This syllabus leaves three class periods which can be used in several different ways. You have three options for the extra classes: 1. You can choose additional chapters to cover from the final two units. 2. You can use the additional classes for deeper skills instruction or	

	opportunities for professional formation after specific Units. 3. You can schedule a "review class" after each Unit to give you some flexibility to either catch up if particular subjects take unexpected additional time or use the class for review or skills instruction if you are on target (the best option for faculty who have never taught PR previously).

B. Three-Credit Hour Course

For three credit hours you can choose to cover additional chapters or incorporate more skills exercises and policy discussions or a little of both.

Here is one sample syllabus stressing skills incorporation. I have not repeated the notes from the two-credit hour syllabus above, but noted (in italics) how you might alter class activities and incorporate additional assignments if you have three credit hours.

If you want to reinforce research skills, you can require students to complete all the research exercises in the text (none are especially onerous) and keep them in a portfolio or post them to a discussion forum. Likewise, if you want to reinforce reflection, an ongoing obligation to maintain a portfolio or journal can be very effective. Obviously you will need to consider whether you have the time to devote to reviewing these student work products. One way to limit the amount of time you spend on review is to indicate to the students that you will not be commenting on every assignment, unless students have specific questions, but will select samples at random from their portfolios for review. In general, if I assign work such as this for which I will not be providing comprehensive feedback; I make the work ungraded or assign no more than 10% of the final grade to these products.

	Student Reading Assignments	Teaching Notes & Assignments to consider
1	Chapter One (1.1 & 1.2)	See syllabus above.
2	Chapter Two (2.1-2.4)	See syllabus above.
3	Chapter Two, cont. (2.5)	See syllabus above.
4	*Voices from the bench and bar*	*In this or the previous class, you may wish to bring in a panel of attorneys to discuss their views of professionalism. I have had especially good results with guest speakers (judges and attorneys) speaking with the class about the local bar association's Tenets of Professionalism (a civility code). I use this panel to engage the students in discussing the role of rules in professional regulation. You can also use a*

		portion of this class to have students report on their interviews with attorneys they completed as part of Exercise 2-C. *Assign roles for Exercise 3-A interview. Students can be divided into groups of 3 to 5 with one student playing the role of client, one or two attorneys, and one or two observers*
5	Chapter Three (3.1-3.3) *Supplemental materials on how to conduct an initial client interview.*	*Provide a brief review lecture and Q&A on the readings and then have students practice their client interview.*
6	*Reflection or questionnaire on interview exercise*	*Feedback on client interview exercise and wrap up of admissions chapter.*
7	Chapter Four (4.1-4.3)	See syllabus above.
8	Chapter Four (4.4) *Chapter Twenty Five The Professional Monopoly* *25.1 Who Are the Gatekeepers to the Profession?* *25.2 What Is the Definition of the Practice of Law?*	In addition to discussion of *Creasy* case, *Researching Professional Responsibility Exercise 25-A: State Definitions of the Practice of Law* *Break students into groups according to their areas of expressed practice interest and have them brainstorm their "competition" (nonlawyer providers of overlapping legal services) and predict the future of UPL enforcement against these services.* *Assign Exercise 7-A Timekeeping exercise*
9	Chapter Five (5.1)	*Have students work together on Professional Responsibility Skill 5-B: Choosing Clients and then report how they would determine whether they would want to turn down a potential client. Then work together on Professional Responsibility Skill 5-A: Drafting Non-engagement Letters and role play situations in which attorneys would turn down clients* *Assign Researching Professional Responsibility 5-A: Finding Forms* *Assign Reflective Practice: Saying Yes, Saying No*
10	Chapter Five, cont. (5.2)	See syllabus above.

11	Chapter Six (6.1-6.6)	*Professional Responsibility Skill 6-A: Difficult Conversations* *Demonstrate a "Difficult Conversation" using the preliminary problem.* *If you are using research exercises, this chapter provides two and would be a good point at which to "check in" with students on their progress in research skills.* *If you are using reflective portfolios, again, there are two prompts in this chapter and this would be a good point to discuss briefly in class the importance of reflection and answer questions.*
12	Chapter Seven (7.1-7.4)	See syllabus above.
13	Chapter Seven, cont. (7.5-7.6)	*As students to demonstrate how they would explain their fees in an initial client interview in a variety of practice settings. Review a variety of fee agreements and billing statements and software.*
14	*Chapter Twenty-Four · Making Law Affordable and Accessible* *24.1 The Need for Legal Services* *24.2 The Right to Counsel* *Turner v. Rogers* *24.3 Reading the Rules: Pro Bono and Appointed Representation*	*This is an excellent point at which to incorporate this chapter. Have students role play Professional Responsibility Skill 24-A: Motion to Withdraw from Appointed Representation in class. This makes a good review exercise for the previous chapters on fees, competence, and withdrawal, while also reinforcing the professional obligation to accept appointments.* *Researching Professional Responsibility 24-A: Local Court Rules*
15	Chapter Eight (8.1-8.5) *Chapter 24, cont.* *24.4 Pro Se Assistance and Limited Scope Representation* *Padilla v. Kentucky* *24.5 Relaxing the Regulations to Insure Access*	*Demonstrate Professional Responsibility Skills 8-A: Explaining the Attorney-Client Relationship in class. Show how the traditional explanations of the relationship would change in a limited-scope representation.*
16	*Unit Review*	*This is a good point to stop and review the rules already covered. When a course emphasizes skill development, students are often skeptical of the*

		degree to which they are actually acquiring knowledge. A review lecture or quiz at this point can be very reassuring.
17	Chapter Nine (9.1-9.3)	See syllabus above.
18	Chapter Ten (10.1-10.5)	See syllabus above.
19	Chapter Eleven (11.1-11.2)	See syllabus above.
20	Chapter Eleven, cont. (11.3-11.5)	
21	Chapter Twelve (12.1-12.4)	
22	Chapter Thirteen (13.1-13.3)	See syllabus above.
23	Chapter 14 (14.1-14.2)	See syllabus above.
24	*Unit Review*	*Again, a thorough review problem would be worthwhile here. This would also be an excellent point at which to administer a mid-term examination.*
25	Chapter Fifteen (15.1-15.4)	See syllabus above.
26	Chapter Sixteen (16.1-16.4)	See syllabus above.
27	Chapter Seventeen (17.1-17.3)	See syllabus above.
28	Chapter Seventeen, cont.	Role play in-house counsel speaking with corporate employees in an internal investigation. Bring in guest speakers who do insurance defense work to talk about the details of their arrangements.
29	Chapter Eighteen (18.1-18.2)	See syllabus above.
30	Chapter Eighteen, cont. (18.3-18.4)	See syllabus above.
31	Chapter Nineteen (19.1-19.4)	See syllabus above
32	Chapter Twenty (20.1-20.3)	See syllabus above
33	*Unit Review*	*A good way to review this unit is to ask students to find a case involving conflicts of interest from your jurisdiction(s) and report to the class on:* *- the nature of the alleged conflict* *- how the attorney could have avoided the dispute*
34	*Chapter Twenty-One · Ethics in Litigation Practice* *21.1 Reading the Rules:*	*Reflective Practice: Your Attitudes Toward Conflict* *I find that emphasizing the limits of law in*

	Tensions in the Role of the Advocate *21.2 Gathering and Preserving Evidence* *A. Legal Limits on Gathering Evidence* *B. Destroying or Tampering with Evidence*	*litigation is increasingly important, as increased competition and client pressures have created pressures for more aggressive tactics.*
35	*21.3 Cooperation in Discovery* *Mancia v. Mayflower Textile Servs. Co.* *21.4 Deposition Practice* *In re Anonymous Member of South Carolina Bar* *21.5 Protecting Your Clients from Discovery Abuses* *21.7 Representing Clients in Mediation*	*Professional Responsibility Skill 21-A: Cooperating in Planning Discovery* *Researching Professional Responsibility: Deposition Practice* *Viewing a demonstration deposition in which an attorney respond to abusive tactics would be especially important for new attorneys beginning litigation practice.*
36	*Chapter Twenty-Two · Communicating with Litigants, Witnesses, and Jurors* *22.1 Reading the Rules: Communication with Represented Persons* *Palmer v. Pioneer Inn Associates, Ltd.* *22.2 Unrepresented Persons Problem for Practice* *22.3 Communication with Jurors and Judges*	*Discussion of the Palmer case.* *Ask students to survey attorneys on how they insure their compliance with these rules and report results in class.* *Role play asking a pro se opponent to sign a waiver of service.* *Researching Professional Responsibility: Who Is a "Represented Person" in an Entity?*
37	*Chapter Twenty-Three · Judges and the Adversary System* *23.1 The Core Duties of Judges* *23.2 Ex Parte Communications — Interactions of Attorney*	*You can use this class primarily as an MPRE preparation class, drilling many of the judicial conduct rules that can be tested, or you can focus on the kinds of issues students are likely to face in judicial clerkships. If your school has a judicial externship program, discussing your lesson plan with the externship supervisor could help to focus your class planning.*

	Ethics and Judicial Ethics *In Re Wilder* *23.3 Ethical Duties of Judicial Clerks* *2 3.4 Dealing with Unethical Judges*	*Researching Professional Responsibility: Using a Table of Contents to Guide Research* *Researching Professional Responsibility: Judicial Discipline*
	An Attorney's First Amendment Speech Rights Revisit Milavetz *21.6 Trial Publicity* *Gentile v. State Bar of Nevada*	*There are many approaches one can take to trial publicity and advertising issues, but I have found that students enjoy wrapping up the semester by examining these issues through the broad lens of constitutional analysis. Examples from current media issues are excellent fodder for examining the rationale and methods behind trial publicity.*
38	*Chapter Twenty-Six · Commercial Speech: Advertising and Solicitation* *26.1 The Controversy over Attorney Advertising* *26.2 Getting Clients — Personal Referrals* *26.3 Advertising Regulation* *Hayes v. New York Attorney Grievance Comm. of the Eighth Judicial District* *26.4 Regulating Solicitation* *26.5 Dignity and the Image of the Profession as a Governmental Interest*	*Researching Professional Responsibility: Constitutionality of Advertising Restrictions* *Attorney free speech issues can be quite engaging for the students, especially when advertising is the topic. Since advertising restrictions have more variations among the states than most rules, it is worthwhile to have the students consider the regulations they will be operating under in their chosen jurisdiction for practice.* *Students also enjoy bringing in advertisements they have seen in local media for discussion.*
39	*Unit Seven Review*	*Asking students to present proposals for increasing access to justice is often an effective review activity for this final chapter.*
40 *41* *42*	Again, this syllabus leaves three class periods which can be used to build in additional review, cover current proposals and issues, or take time for deeper skills instruction or opportunities for professional formation after specific Units.	

Part Two: Chapter Guides

Chapter One: What is a Professional?

Chapter One provides an overview of the practice of law. The goal of this chapter is for students to have a clearer picture of the profession they are seeking to enter. This chapter provides a very brief overview of a very complex sociological and demographic picture. You will want to decide the level of proficiency you wish the students to reach on this subject. If you want the students to achieve more than an introductory level of proficiency, you will likely want to supplement the section with additional readings, guest speakers, research assignments, and service learning or field observation experiences.

The section addresses the provision of legal services as both a business and a profession. The section begins with a basic overview of practice settings. You may wish to supplement this information with additional information regarding the legal market in your own community. Students may have additional questions about what it is like to work in these different settings. A useful resource to draw from is the American Bar Association market research at http://www.abanet.org/marketresearch/resource.html.

It is important to give some attention to this practical aspect of the future work life of the students. The business aspects of practice may dominate the thinking of some students: Where will I get a job? How much will I make? Will I enjoy my work? Some time spent recognizing these concerns and helping these students find answers to these questions will be important to engaging these students in thinking about the broader picture of access to justice. For other students, it is the access to justice issue that drives their interests in legal practice. Spending some time on the practical questions of how they will earn a living provides an important reality check for them as well.

The objectives of this lesson are introductory and foundational. Be sure to take the opportunity to reinforce the key perspectives introduced here in subsequent classes. Pay attention to the degree to which student raise questions about the practical consequences (technical professionalism) and the consequences to the client, the courts, and the public (civic professionalism) of an attorney's conduct.

An outline for a 50-minute class could include the following elements (with suggested times):

I. Introductions, housekeeping (5 minutes, unless there are issues particular to your school or course that require additional time)

II. LECTURE: Seeing ourselves as professionals (10 minutes to review results of student's survey answers regarding their preferred practice settings and their learning goals for the course.

These can be compared with the readings in Chapter one to provide a brief review of the demographics information.)
III. DISCUSSION: Students report on demographics research (5-10 minutes to have students contribute their own learning from demographics research assignment or to ask questions or make comments about the reading).
IV. DIALOGUE or QUIZ: What are the characteristics of a technical professional? A civic professional?

Outcomes, Assessments, and Assignments

Outcome 1-a: Formation of Professional Identity

Students should begin to develop a personal career plan that accurately assesses the market possibilities in light of the demographics of the profession.

Reading Assignment:

Chapter 1.1 (page 6-12)

Research Assignment:

Assigning a research project that allows students to explore their own questions about the profession is effective, not only for expanding student knowledge, but also for increasing student motivation in the course.

ASSIGNMENT—What do you want to know about your career?
Identify one question you have about the profession that is not answered by the demographics information in Chapter One. Try to find an answer for that question. Submit a report of no more than 150 words providing:

1. The question you asked
2. The answers you found (or your inability to find an answer)
3. The citation to the source for your answer (or if you were unable to find an answer, the research method you used to try to locate the answer).

Due: assignment drop box by 5:00 p.m. [day preceding our next class].

Rubric for Demographics Research Assignment

I assess the quality of students' curiosity about their chosen profession by the types of questions they ask and the quality of the answer they obtain in the research/interview exercises (described below). Students are nearly uniformly highly motivated to learn more about what they

might be doing as attorneys, how much they might earn, what their work-life might be like, and whether they will "fit in." I do not test these materials on the final exam.

Question Asked	Student asked a focused question about the profession	Student asked a broad, general, or frivolous question about the profession
Research conducted	Student's research located specific information that answered the question from reliable sources (e.g., scholarly, unbiased) or described a research method that indicated a competent effort to locate the answer.	Student's research located answer but from less reliable source (e.g., private blogs, advertisements) or described a research method that indicated minimal effort or competence in effort to locate the answer.
Citation	Complete and accurate	Incomplete or inaccurate
Format, Timing & Method	Student submitted assignment on time and in proper form	Student's report was late, submitted improperly, or in improper form

Outcome 1-b: Formation of Professional Identity

In analyzing a professional responsibility issue, students should be able to raise questions about the practical consequences (technical professionalism) and the consequences to the client, the courts, and the public (civic professionalism) of an attorney's conduct.

Reading Assignment:

Read Chapter 1.2 (pages 12-14).
Read the Preamble to the Rules of Professional Conduct.
Think about how the materials inform your career plans.

Assessment: Minute Paper / Observation of Responses in Class Discussion

This is an ongoing outcome goal that I ordinarily assess through observation of the increasing breadth of student responses when considering questions of professional conduct. For many years, I began the first class by having the students draw a picture of a "professional" and then showed these to the class using the document camera. The pictures inevitably show a professional sports figure or an iconic lawyer—symbols of education (briefcase, diploma), pressure (watch or clock), wealth (money, fancy cars), and status (suit and tie). Rarely is a client in the picture.

In more recent years, students have had less patience with this assessment activity. I would consider asking students to describe their ideal attorney may be another route to the same discussion of what makes a professional or using Atticus Finch of "To Kill a Mockingbird" as a focal point for a discussion of what makes a professional.

Additional TBL Assessment:

Student teams will agree upon rules of professionalism for their team.

Criteria for Assessment of Student Discussion:

Do the students reflect concern for others in their descriptions of attorneys?

Do the students recognize the tension that can develop between visions of technical professionalism and civic professionalism?

Outcome 1-c: Formation of Professional Identity

Students should perceive the value of reflection in improving their professionalism.

Written Assignment:

Reflective Practice (pages 14-15).

This chapter includes an assignment for students to write a short reflection on their attitudes toward collaboration in the profession. This is an especially useful reflection for assessing team building in the TBL classroom, as the students can compare their attitudes before and after the class experience.

You can assign this reflection or provide other reflection prompts. The materials in this chapter can provide excellent opportunities for reflective practice that will reinforce both the practice management and professional development outcomes of the course.

Assessment: Student responses on reflection papers

See appendix for additional guidance on using reflective writing as an assessment of student professional identity formation. I do ordinarily assign some grade weight to these reflections (no more than 10%) as part of the final grade.

Suggested Classroom Learning Activities

Students are generally quite interested in the demographics of their future profession. One way to engage the students in thinking about these materials more completely is to ask them to discuss how these statistics connect to the broader question of professionalism. The discussion can also be used to weave together the materials on civic professionalism and technical professionalism.

1. Set Up

When this chapter is assigned for the first class, the set up for the class must be an introduction to the course, administrative matters, etc.

To set up the discussion of student perceptions (and hopes & fears) about professionals and their future career, one can begin with some activity to gather student perceptions. One approach is to ask students to actually draw the picture discussed in the preliminary problem. The results of these drawings, which I will often show to the class using the classroom document camera, often will include a number of symbols of the status, education, time pressures and financial rewards of the profession. One or two students may draw a doctor or other category of professional. One or two will draw a professional athlete. Few students will draw a client or any other person in their picture. These pictures provide a rich basis for discussion of the meanings of professionalism in the text. I use the pictures to reinforce to the students the need to "keep the client in the picture" as a basic tenet of professionalism.

A second approach is to discuss the public image of lawyers. In the electronic resources for this chapter, you can find "A Coloring Book for Lawyers"—a satirical item posted on several different websites over the past five years. Despite its cynicism, this might be an effective discussion tool for public image and work/life balance discussions.

Some teachers of Professional Responsibility use lawyer jokes to introduce the course—highlighting the public's perception of attorneys as greedy, dishonest, and arrogant. I personally don't enjoy using the lawyer joke approach, but if you feel comfortable with the approach, be sure to use each joke to point out specific public perceptions. For example:

> "How do you know it's cold outside? A lawyer has his hands in his own pockets." [Lawyers are greedy.]
>
> "An old man was on his death bed. He wanted badly to take some of his money with him. He called his priest, his doctor and his lawyer to his bedside. "Here's $30,000 cash to be held by each of you. I trust you to put this in my coffin when I die so I can take all my

money with me." At the funeral, each man put an envelope in the coffin. Riding away in a limousine, the priest suddenly broke into tears and confessed, "I had only put $20,000 into the envelope because I needed $10,000 for a new baptistery." "Well, since we're confiding in each other," said the doctor, "I only put $10,000 in the envelope because we needed a new machine at the hospital which cost $20,000." The lawyer was aghast. "I'm ashamed of both of you," he exclaimed. "I want it known that when I put my envelope in that coffin, it held my personal check for the full $30,000."
[Lawyers lie to and cheat even their clients … And they get away with it.]

"A lawyer falls into the ocean full of sharks, but is not attacked. Why? Professional courtesy."
[Lawyers are predators who respect no one except each other, of whom they are very self-protective.]

2. Discussion

(Sections 1.1-1.2, all outcomes)

If you wish to cover this material using a dialogue, some questions you might consider:

- What surprised you about the numbers?
- What are the qualities of an ideal attorney? (In addition to the qualities discussed in the reflection exercise at the end of the chapter, you may want to refer students ahead to the characteristics noted in the reflection exercise in Chapter 6 (Competence)).
- Why does the public have a negative image of lawyers? (Some answers you will hear are bad publicity/public relations, public doesn't understand what lawyers do, make money on crisis, political tensions, advertising, etc.).
- What changes in the profession have created pressures on a shared vision of professionalism? (Some answers students may supply or you may elicit include:
    - Demography—increased numbers have depersonalized and created competition and also created.
    - Moral diversity—rules of professionalism replacing shared moral values (Notice the transformation from 1908 "Canon of Ethics" to "Code of Responsibility" to "Rules of Conduct").
    - Increased client control—consumerism—expansion of "Rights consciousness."
    - Urbanization—lawyers don't know each other anymore so informal sanctions don't work.
    - Economics—efficiency is important—$80,000 overhead before begin making profit—longer hours, more stress/competition & advertising - student loans.
    - Technology—increased stress of immediacy .
    - No mentors or role models for new lawyers.)
- The text indicates that most clients come from referrals from other clients and from lawyers. How does knowing that impact your thinking about your practice? (This is a

great question for helping students to reflect on the role of reputation in professional regulation.)

- The preamble to the Model Rules says that "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 barriers cannot afford or secure adequate legal counsel." Given this, how do you respond to the numbers you've read about attorneys for low-income persons? (Be prepared: This can be a touchy discussion because of political polarization in your class.)

3. Lecture & Reporting

(Section 1.1, Outcome 1-a)

If you have asked students to research a question of their own about the profession and have had an opportunity to review those answers before class, you can report on student research. You can also solicit additional questions or reporting from the students. Some questions and answers my students have asked and answered include:

How hard will I work? Will I keep my job?

Statistics will not really answer the underlying concerns that cause students to ask these types of questions. I encourage students to talk to attorneys in the fields of practice they are interested in pursuing.

Career paths: How many lawyers switch careers after five years of working? Where do most lawyers work?

There are a number of fine resources for students to look to for career paths. In particular, students often ask how often attorneys change careers, leave firms, leave the practice. A Stanford Law project collects data from the most useful sources and provides an excellent starting point for research on this subject. The paper is Katie Burghardt, *et. al.*, *Alternative Career Paths: An Annotated Bibliography* (2007) at http://firms.law.indiana.edu/research/AltCareerPaths.pdf.

Billable hours requirements:

Billable hours are higher in larger firms. In 1-4 lawyer firms, 81% of associates bill fewer than 1800 hours annually; in 5-15 lawyer firms, the percentage drops to 69%. http://www.abanet.org/yld/satisfaction_800.doc.

What will my job cost me? Will I hate my job?

A number of students ask questions each year about alcoholism, substance abuse,

divorce, and other stressors. Your state's lawyers assistance program website can be a useful resource to which to direct the students.

Mental health: 15-18% of attorneys will have substance abuse problems compared to 10% of the general population. Attorneys have the highest rates of depression and suicide of any profession. http://lifeatthebar/wordpress.com/2006/03/14/surveys-of-lawyers-satisfaction-levels.

Other questions and answers

Other questions often relate to the particular demographics or interests of the student and amount to "How many attorneys are there like me?" For example, I often have women in the class asking about gender disparities in the law. "According to the ABA, women comprise only 30 percent of the legal profession, 17 percent of partners in private practice, 16 percent of the general counsel for Fortune 1000 corporations and 17 percent of the GCs for Fortune 500 corporations. The ABA further reports that women lawyers' weekly salary as a percentage of male lawyers' was, respectively, 69 percent, 77 percent, 73 percent, 78 percent and 71 percent for 2006 and the previous years." http://www.law.com/jsp/law/careercenter/law ArticleCareer Center.jsp?id=1202421708176.

4. Guest Lecture

(Section 1.1, Outcome 1-a)

While I have found that guest lecturers for the first class are not generally a good idea, when I have assigned the material from Chapter one for a later class, I have had success with taking a portion of the class period to invite the director of career services to attend this class and answer students questions and concerns. Students often want additional information about placement rates, both nationally and for your own school, and about career planning.

5. Closure

Some of the conclusions I like to reinforce at the end of class are:

- Thoughtful consideration of the demographic and economic facts of your profession can help you to make better career choices.
- One of the most important ethical choices you will make is the choice of practice field and setting.
- The independence and authority of the law and lawyers alike depend on the extent to which lawyers uphold the rule of law and access to justice.

Background Notes and Additional Reading

I like to avoid historical comparisons because it too easily sounds like "the good old days" talk, however, the following charts are good to have in mind in leading a discussion of factors in a shared professional identity:

Comparing Then & Now: 30 years of change

Legal Profession	
1970s	**2000s**
Fewer than 750,000 lawyers in the U.S.	More than 1 million lawyers in the U.S.
Less than one lawyer for every 400 people in the U.S.	At least one lawyer for every 200 people in the U.S.
Lawyers viewed as well-respected members of the community.	Lawyers viewed with mistrust by the general public.
Practice of law is the exclusive domain of independent law firms.	Law firms feel the incursion of accounting firms, financial planners, HR consultants and others.
Clients are relatively unsophisticated and willing to accept lawyer advice at face value.	Clients are more sophisticated and less hesitant to question their options.
Sphere of business and social interaction is the local community.	Sphere of business and social interaction is global in reach.
Lawyers have carte blanche to litigate cases.	Budget squeeze in corporations results in profit squeeze in law firms.
Invoices to clients read "$XX,000 for services rendered."	Invoices are subject to voluminous billing guidelines, detailed descriptions of billing activities, limitations on billable events and more.
Secretaries take dictation.	Word processing is ubiquitous and voice recognition software is on the rise.
Lawyer to secretary ratio is 1:1.	Lawyer to secretary ratio is 3:1.
Lawyers have little or no technology training or experience.	Lawyers use computers regularly and expect firms to provide the latest technology tools and gadgets.
Legal research tools consist of paper libraries	Legal research tools include Westlaw,

with hardback legal digests, Shepard's and the like.	Lexis-Nexis, the Internet and other electronic resources.
Formal dress code is the standard, with Sunday considered the only casual day.	Casual dress code is preferred, with business casual acceptable Monday through Friday.
Lawyers work primarily from firm offices and are accessible to clients via telephone and mail.	Lawyers are mobile and constantly accessible to clients through the advent of e-mail, laptops, PDAs, BlackBerrys, cell phones and remote office systems.
Profession is dominated by white males.	Profession is more inclusive of women and people of color.

Legal Career	
1970s	**2000s**
Jobs for decent students are plentiful at good law firms.	Job market is extremely competitive, with top-school degree or top-of-class standing required for large firms and best-paying jobs.
Associates invited into firm partnership after 5 to 7 years of good work.	Associates possibly invited into partnership after 8 to 10 years of high productivity, development of a book of business and some participation in firm management or administration.
Lawyers look for rewards in terms of financial success and elevation to partnership.	Lawyers look for rewards in terms of financial success, flexibility, freedom, autonomy and increase in opportunities.
Lawyers look to build lifetime careers in one firm.	Lawyers look to leverage their credentials by moving from one firm to the next.
Billable-hour requirements are moderate.	Billable-hour requirements are high.
Lawyers wait for opportunities for career progression.	Lawyers are more impatient in terms of career progression.
Discussions of the business case for diversity are limited or nonexistent.	Diversity is expected as an inherent part of doing business.
Definition of diversity means more women in the workplace.	Definition of diversity includes race, gender, age, sexual orientation, religion, thinking style, geographic location, lifestyle and more.

Formal feedback is given once a year, if at all.	Constant feedback is expected, and often given informally after each project.

Financial Factors	
1970s	**2000s**
Little or no debt at law school graduation	Student loan debt at law school graduation is often $60,000 to $120,000 or more.
National average associate starting salary is less than $25,000.	National average associate starting salary is more than $70,000.
Young lawyers expect to pay dues, then achieve financial payoff.	Young lawyers expect quicker financial payoff.
Single-income family is the norm.	Dual-income family is common.
Little or no childcare outside the home.	High-cost childcare outside the home.
Lawyers work full-time.	Firms have part-time and contract lawyers.
Lawyers live to work.	Lawyers want to lead balanced lives.
Stay-at-home spouse handles household and childcare duties and working spouse devotes evenings to client development, bar and community activities.	Both spouses have responsibility for household and childcare duties throughout the week.

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Chapter Two: What Laws Govern Attorney Conduct?

Chapter Two provides an overview of sources of regulation of attorney conduct. This is an overview chapter, with far more content than can be discussed in depth in a 50-minute class. I try to use the class period for this chapter to address some fundamental misconceptions and set the tone for future classes where the themes in this chapter can be reinforced.

I have found that students tend to oversimplify the doctrinal content of the professional responsibility course. In particular, there are two fundamental misconceptions that need to be addressed in this chapter and reinforced throughout the course. One is that the rules of professional conduct are the sole source for regulation of attorney conduct (a misperception reinforced by the MPRE's near-exclusive testing of that set of rules). The second is that the ABA Model Rules of Professional Conduct are the law, as opposed to the understanding that they are merely models that state and federal courts adopt and adapt. Thus, my primary goal in this chapter is to introduce the complexity of regulation of the profession—a goal that requires continual reinforcement throughout the course. A secondary goal is to reinforce the basic lawyering skills of close rule reading and of research.

Outcomes, Assessments, and Assignments

Outcome 2-a: Reading and Analyzing Lawyer Regulation

Students should be able to read and interpret a reporting rule and apply it to a range of situations in which they have information about another attorney's conduct.

Reading Assignment:

Sections 2.2-2.3 (pages 21-27).
Rule 8.3 and comments in the Rules of Professional Conduct.

In assigning Chapter Two, emphasize to the students the importance of careful rule reading and study. I have heard from so many teachers of Professional Responsibility that one of their frustrations with students in the course is their seeming unwillingness to read the rules. This is one of the reasons I have included the text of rules in the casebook. However, if you expect students to read the entire text and comments of the Model Rules or your own state's rules, you will especially need to emphasize these assignments.

Assessment:

State the Rule Minute Paper (see Classroom Activity 5 below).

You can assign the students to complete this exercise out of class, but I encourage you to try one in class. I use these "state a rule in your own words" minute papers at least three times during the semester. For more on this method see Minute Papers in the teaching strategies section of Part One.

Outcome 2-b: Reading and Analyzing Lawyer Regulation

> Students should be able to explain how an attorney disciplinary action starts and what outcomes might result from that action; recognize issues of professional responsibility as implicating multiple sources of regulation so that, when faced with an issue of professional responsibility, they will be able to brainstorm a thorough list of possible legal constraints and conduct the necessary research to guide their conduct; and perceive the increasing role of statutory and administrative regulation that regulates attorney conduct and be able to identify the constitutional issues raised by this regulation.

Reading Assignment:

> Chapter Two, particularly sections 2.3 and 2.5-2.6 (pages 35-47).
> Rule 8.4 and the comments in the Rules of Professional Conduct.

In addition to assigning student to read Chapter Two, you may wish to instruct them to read a particular state's disciplinary rules or state bar website description of discipline process.

To emphasize the prevalence and currency of the issues in the class, as well has inform students to research sources, I ask students to bring examples of lawyer misconduct to class. I review with the class some important sources for learning about current news in professional responsibility, such as the ABA/BNA Lawyers Manual and professional responsibility blogs.

Assessment:

These are ongoing learning outcomes throughout the course. Your assessment of these outcomes depends in part on the level of mastery you expect. As to discipline, I expect students to master the basic vocabulary: admonition, reprimand, suspension, disbarment, reinstatement, misconduct, etc. Beyond that, however, I want students to have a realistic sense of what discipline involves. A discussion of the disciplinary process in the two cases in this chapter will reveal student understanding of the process and consequences. Students often do not appreciate the seriousness of a reprimand or suspension. At the same time, students tend to view the disciplinary process through the lens of criminal procedure and do not appreciate the extent to which disciplinary counsel has a wide-ranging authority and the importance of alternatives to discipline for fitness issues.

As to other sources of regulation, assessment at the end of the course can be as simple as asking students to generate multiple consequences of a problem or can focus in more carefully on the relationship between two areas of regulation (e.g. disqualification v. discipline for conflicts)

For student self-assessment, you may suggest the CALI lesson at the end of the chapter. For more on using CALI lessons, see the general teaching suggestions in Part One above.

Pre-class Quiz Assignment:

You can assign a quiz to be completed before class online or on paper to reinforce the rule reading and basic concepts from the chapter. If you assign the quiz online, you can review results before class begins. If you assign the quiz for students to bring to class, I suggest having students report their answers using clickers or some other reporting device (such as cards they can hold up with the letter of their answer) other than "raise your hand." Students are far too likely to look around and change their answer to reflect the crowd and thus give you a distorted view of their understandings. I prefer to use online pre-class quizzes since I can see the range of responses before class. Some faculty prefer to use in-class rather than pre-class quizzes because they will include results of the quizzes as part of the grade calculation. I am reluctant to use the class time for this purpose. (In team-based learning, students take these quizzes as a team during class, which I don't resent as a use of class time because of the debate and dialogue that surrounds that process).

1. Which of the following sources of law that may govern attorney conduct would be the binding (as opposed to secondary or persuasive) authority for a [Yourstate] court in determining discipline?

A. An ABA Formal Ethics Opinion
B. The text of the ABA Model Rules of Professional Conduct.
C. A [Yourstate] Supreme Court rule.
D. A [Yourstate] statute governing attorney conduct.
E. A [Your state] appellate court opinion on malpractice.

2. You have made a terrible mistake in handling your client's case. You filed a petition using law that had very recently been overturned and you had not conducted adequate research to discover that law. Now your client's petition has been dismissed and the statute of limitations has run. You are concerned about the effect this mistake will have on your ability to practice law in the future. Which of the following would be the single most important search term for you to use in searching your state's court decisions?

A. malpractice
B. competence
C. fiduciary
D. frivolous pleading
E. statute of limitations

3. Attorney's wife was hospitalized after a domestic dispute with Attorney. She obtained a full order of protection[43] against Attorney. The findings in this case would support a prosecution for criminal assault and battery but the prosecutor has declined to prosecute, believing the protective order to be sufficient deterrence. Is Attorney subject to discipline for this violent behavior?

A. Yes, because his conduct is prejudicial to the administration of justice.
B. Yes, because assault and battery is criminal conduct that reflects adversely on Attorney's fitness.
C. No, because attorney has not been convicted of a crime.
D. No, because attorney's conduct was not in the course of representing a client.

Answer 1: For most states the answer is C. This question helps assess student confusion about the role of the ABA (answers A &B), the split between courts and legislatures (answer D) and the difference between civil liability and discipline (answer E)

Answer 2: This question helps focus student attention on the significance of the disciplinary consequence (Answer B) while also reinforcing the many other consequences of misconduct such as civil liability (Answers A & C) or procedural sanctions

Answer 3: The best answer is B. Comment 2 to Rule 8.4(b) includes crimes of violence as falling within the intended scope of crimes that reflect adversely on fitness to practice law. *People v. Reaves*, 943 P.2d 460 (Colo. 1997); Karen A. Geraghty, *Bruising the Legal Profession: Attorney Discipline for Acts of Domestic Violence*, 28 RUTGERS L. REV. 451 (Winter 1997). A might be invoked but students should be discouraged from applying this rule outside the context of conduct in relationship to the courts. Students who choose C have not read 8.4 carefully enough to see that no convictions are necessary. Likewise, students who choose answer D have not read the materials sufficiently to understand that misconduct can be based on conduct not otherwise expressly governed by other disciplinary rules, conduct not otherwise prohibited by law, and conduct while in one's private capacity.

[4343] Or whatever adult protective orders are called in your state.

Outcome 2-c: Researching Issues in Professional Responsibility ⓘ

Students should be able to access and evaluate specialized sources of regulation and guidance in their particular practice area.

Research Assignment:

Research Problems 2-B (Finding Disciplinary Rules, page 46) and 2-C (Professional Guidance in your Practice Area, page 60).

I provide the following additional instructions:

Read the research problems on pages 46 and 60. Identify one area of practice to investigate (for example, bankruptcy, or commercial transactions, or criminal defense, or estate planning). Complete the following questions:

1. What are the disciplinary rules that will govern your practice? Where can you find those rules? Provide directions (a URL, catalogue number, etc.) for locating the text of these rules.

2. Search for two professional organizations for your practice area. Provide the name of each organization, a one-sentence description, and a URL for the website (or other contact information if not available on the web).

3. Identify whether there are model standards or codes of ethics designed for your particular practice area. Provide a URL for the website at which one can find (or obtain) that code.

Due [date & time]
[Submission procedure & format]

The assignments take little time for either the students to complete or you to review but pay off in dividends on reinforcing the reality that this is one of the courses in the curriculum most students will need to address every day of their career. I elaborate on these assignments by providing the following instructions:

Assessment:

Research exercises can be scored simply by the accuracy of the student's research results. I am amazed by the breadth of sources students continue to find. Students have reported the following specialized organizations:

1) State and Local Bar Association Sections and Committees
2) The American Bar Association (Various Sections & Committees)
3) American Bankruptcy Institute
   http://www.abiworld.org/
4) National Association of Bankruptcy Trustees
   http://www.nabt.com/
5) National Association of Consumer Bankruptcy Attorneys - NACBA
   http://nacba.com/
6) American Immigration Lawyers Association:
   http://www.aila.org/content/default.aspx?docid=15764
7) Federal Bar Association
   www.fedbar.org/
8) Association of Corporate Counsel
   http://www.acca.com
9) Federation of Defense and Corporate Counsel
   http://www.thefederation.org
10) Ethics Officer Association
    http://www.eoa.org
11) American College of Real Estate Lawyers
    http://www.acrel.org/
12) National Association of Criminal Defense Lawyers (NACDL)
    http://www.criminaljustice.org
13) National Association of Legal Aid and Defender Association
    http://www.nlada.org
14) Association of Federal Defense Attorneys
    http://www.afda.org
15) International Criminal Defense Attorneys Association
    http://www.hri.ca/partners/aiad-icdaa/
16) National Association of Federal Defender
    http://www.federaldefenders.org/
17) National District Attorney Association & The American Prosecutors Research Institute
    http://www.ndaa-apri.org/index.html
18) International Association of Prosecutors
    http://www.iap.nl.com/

19) Sports Lawyers Association
http://www.sportslaw.org/
20) Black Entertainment and Sports Lawyers Association
http://www.besla.org/
21) IDLO: International Development Law Organization
http://www.idlo.int
22) Department of International Legal Affairs
http://www.oas.org/DIL/
23) OECD (Organization for Economic Cooperation and Development)
http://www.oecd.org
24) The American Society of International Law
http://www.asil.org/
25) International Law Students Association
http://www.ilsa.org/
26) The Environmental Law Institute
http://www2.eli.org/membership/pro_members.htm
27) American Academy of Matrimonial Lawyers
http://www.aaml.org
28) Association Of Family And Conciliation Courts
http://www.mediate.com/articles/afccstds.cfm
29) National Association of Counsel for Children
http://naccchildlaw.org/documents/naccrecommendations.doc
30) American Intellectual Property Law Association
http://www.aipla.org/
31) National Association of Patent Practitioners
http://www.napp.org
32) National Institute for Trial Advocacy
http://www.nita.org/
33) Association of Trial Lawyers of America
http://www.atlanet.org/litgroups/index.aspx
34) National Board of Trial Advocacy
http://www.nbtanet.org/public/misc/about-nbta.shtml
35) Defense Research Institute
http://www.dri.org
36) Association of Defense Trial Counsel
http://www.adtalaw.com
37) American Academy of Estate Planning Attorneys
http://www.aaepa.com/
38) American College of Trusts and Estates Counsel
http://www.actec.org/

39) National Association of Estate Planners and Local Councils
http://www.naepc.org/
40) National Academy of Elder Law Attorneys
http://www.naela.com/
41) National Organization of Social Security Claimants' Representatives (NOSSCR)
http://www.nosscr.org
42) National Health Law Project (NHeLP)
http://www.healthlaw.org
43) Council of Parent Attorneys and Advocates (COPAA)
http://www.copaa.net
44) Bazelon Center for Mental Health Law
http://www.bazelon.org/
45) Defense Employment Lawyers Institute (DELI)
46) National Employment Lawyers Association (NELA)
47) College of Labor and Employment Lawyers
48) National Association of Tax Professionals
http://www.natptax.com/
49) National Association of Public Interest Law (Equal Justice Alliance)

Among the model standards they have identified are:

1) American Bar Association Standards Relating to the Administration of Criminal Justice
http://www.abanet.org/crimjust/standards/home.html
2) DOJ Compendium of Standards for Indigent Defense Systems
http://www.ojp.usdoj.gov/indigentdefense/compendium/standardsv1/welcome.html
3) ABA Standards of Practice for Lawyers Representing Children in Custody Cases
http://www.abanet.org/family/Approved%20standards%20practice.pdf
4) ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases http://www.abanet.org/family/standards.pdf
5) American Academy of Matrimonial Lawyers Bounds of Advocacy
http://www.aaml.org
6) Association Of Family And Conciliation Courts, Model Standards of Practice for Family and Divorce Mediation
http://www.mediate.com/articles/afccstds.cfm
7) National Association of Counsel for Children Recommendations for Representation of Children in Abuse and Neglect Cases
http://naccchildlaw.org/documents/naccrecommendations.doc
8) ABA Litigation Section, Ethical Guidelines for Settlement Negotiations
http://www.abanet.org/litigation/ethics/settlement.html

9) American College of Trusts and Estates Counsel, "Commentary on the Model Rules," providing specialized advice regarding the application of the rules to estate planning practice
http://www.actec.org/pubInfoArk/comm/toc.html
10) The National Society of Tax Professionals Code of Ethics and Rules of the Society
http://ww.nstp.org
11) National Legal Aid and Defender Association
http://www.nlada.org/Defender/Defender_Standards/Defender_Standards_Home

Interview Assignment: Attorney Perspectives on Professional Regulation and Ethical Practice

Asking the students to interview attorneys is a simple form of experiential learning. Experiential components help students view the course material as real rather than academic, with class discussions reflecting increased curiosity and enthusiasm for the subject. The students recognize that they have insights and experience to contribute and as they are exposed to views of professionals other than their professor. Through these experiential components, students learn skills of observation, reflection, and professional networking often unavailable outside of clinical programs.

I ask students to interview attorneys about PR issues. This helps further the students' understanding of the world of legal practice and nearly always reinforces for students the importance of the course as preparation for practice. I generally assign this as a team or group project, though depending on the size of your class and the size of your legal community, it could be assigned as an individual project.

I provide following additional instructions:

ASSIGNMENT: Identify an attorney who practices in your area of practice and interview him or her about the ethical issues that are most common and the issues that are most difficult in his or her area of practice. Provide the name and contact information (a phone number or email address will do) of the attorney you interviewed and summarize the ethical issues identified in your conversation. If you have any difficulty identifying attorneys, I would be happy to provide some referrals.

<u>Guidelines for Interviewing Attorneys</u>

First contact the attorney you wish to interview. Introduce yourself and inform the attorney that you are conducting the interview for a class assignment and that the information they provide will be shared with the class. Ask if they are available to speak with you for about 15-20 minutes for the interview. Arrange for a time to speak with

them personally over the phone or in person. Do not text or email attorneys with a list of questions and ask them to fill out the answers.

Make sure that whomever you choose is comfortable with the idea of having you ask him or her questions. Let them know that they don't have to answer any question they don't want to answer. Give them my name and contact information so they can call with questions or concerns about the assignment.

I advise against recording the interview. Have a conversation for about 15 minutes and then IMMEDIATELY after the interview is over, review your notes and fill out the information you jotted down during the interview.

The most important thing during the interview is to LISTEN to what the person is saying to you and to ask appropriate follow-up questions if you do not understand.

Do NOT ask about individual experiences with disciplinary matters, client representations or other personal experiences. You are asking only about the attorney's general views on common ethical issues among attorneys as a whole in their field of practice.

Be sure to obtain contact information so that I may thank the attorney for their assistance with your learning.

Provide a brief report of your interview, (limited to 500 words or less) describing the attorney you interviewed (what do they do and what is their contact information), and what you learned about the ethical issues they face in their field of practice.

Due: assignment in drop box by 5:00 p.m. [day preceding our next class].

Assessment:

For assessment of the interviews, you may use the following rubric:

Attorney interviewed	Student interviewed an attorney who practiced in their field of practice	Student interviewed an attorney who was easy to locate but who was not in their field of practice
Depth of interview	Student report reflects a complete interview—asking and obtaining information about both common and difficult ethical issues.	Student report reflects an incomplete interview—asking about ethical issues only generally or not discussing ethical

	Descriptions of issues were complete and detailed.	issues at all. Descriptions of issues were vague and general.
Contact information	Student provided complete contact information	Student provided incomplete contact information
Format, timing & method	Student submitted assignment on time and in proper form	Student's report was late, submitted improperly, or in improper form

I do assign at least one research assignment that counts toward the final grade, though never more than 10%.

Outcome 2-d: Formation of Professional Identity

Students should clarify their own stance on the reporting obligation and the reasons for that stance.

Reading Assignment:

Section 2.4 (pages 25-35).

In- class Assessment:

See activity #6 below. The margin questions on page 29 could also provide an excellent prompt for reflective writing. Some prompts include:

> Question 2 after the Riehlman case—How can you know whether you are joining a firm that is likely to demand that you engage in or cover up unethical conduct?

[This requires only some brainstorming, but is important for students to consider ahead of time.]

> Have you ever been subject to a reporting requirement in another setting (perhaps during law school?) Reflect upon your observations and experience with this obligation. How do you think this experience will shape your response to your reporting obligation under the Rules of Professional Conduct?
>
> Put yourself in Riehlman's shoes and reflect on how you think you might have responded and why.

The following excerpt can be assigned as a reflection prompt on the relationship between rules and ethics:

As a law student, and then as a young lawyer, you will often be encouraged to distinguish ethical from unethical conduct solely by reference to the formal rules. Most likely, you will devote the majority of the time in your professional responsibility class to studying the rules, and you will, of course, learn the rules cold so that you can pass the Multi-State Professional Responsibility Exam ("MPRE"). In many other ways, subtle and blatant, you will be encouraged to think that conduct that does not violate the rules is "ethical," while conduct that does violate the rules is "unethical."

It is in the interests of your professors, the organized bar, and other lawyers to get you to think about ethics in this way. It is a lot easier for a professor to teach students what rules say than it is to explore with students what it means to behave ethically. (Fortunately, many professors resist the temptation to teach only the rules, but many others do not.) Defining ethics with reference to rules puts tremendous power in the hands of the organized bar that writes those rules. And many lawyers want "the absence of disciplinary measures and adherence to the profession's own Model Rules of Professional Conduct" to be sufficient to qualify a lawyer as "ethical," simply because it is easy to avoid disciplinary measures and to adhere to at least the letter of the formal rules.

I don't have anything against the formal rules. Often, they are all that stands between an unethical lawyer and a vulnerable client. You should learn them and follow them. But you should also understand that the formal rules represent nothing more than "the lowest common denominator of conduct that a highly self-interested group will tolerate." For many lawyers, "ethics is a matter of steering, if necessary, just clear of the few unambiguous prohibitions found in rules governing lawyers." But complying with the formal rules will not make you an ethical lawyer; any more than complying with the criminal law will make you an ethical person. Many of the sleaziest lawyers you will encounter will be absolutely scrupulous in their compliance with the formal rules. In fact, they will be only too happy to tell you just that. Complying with the rules is usually a necessary, but never a sufficient, part of being an ethical lawyer.

The second thing you must do to be an ethical lawyer is to act ethically in your work, even when you aren't required to do so by any rule. To a substantial extent, "bar ethical rules have lost touch with ordinary moral intuitions." To practice law ethically you must practice law consistently with those intuitions. For the most part, this is not complicated. Being an ethical lawyer is not much different from being an ethical doctor or mail carrier or gas station attendant. Indeed, long before you applied to law school, your parents had probably taught you all that you need to know to practice law ethically. You should treat others as you want them to treat you. Be honest and fair. Show respect and compassion. Keep your promises.

Here is a good rule of thumb: If you would be ashamed if your parents or spouse or children knew what you were doing, then you should not do it.

> The third thing you must do to be an ethical lawyer is to live an ethical life. Many big firm lawyers—who can be remarkably smug about the superiority of the ethical standards of large firms—ignore this point. So do many law professors who, when writing about legal ethics, tend to focus solely on the lawyer at work. But being admitted to the bar does not absolve you of your responsibilities outside of work—to your family, to your friends, to your community, and, if you're a person of faith, to your God. To practice law ethically, you must meet those responsibilities, which means that you must live a balanced life. If you become a workaholic lawyer, you will be unhealthy, probably unhappy, and, I would argue, unethical.
>
> Now I recognize that we live in an age of moral relativism—an age in which "behavior is neither right nor wrong but a matter of personal choice." Your reaction to my claim that an unbalanced life is an unethical life may very well be, "That's just your opinion." It is my opinion, but it is surely not just my opinion. I would be surprised if the belief system to which you subscribe—whether it be religiously or secularly based—regards a life dominated by the pursuit of wealth to the exclusion of all else as an ethical life, or an attorney who meets only his responsibilities to his clients and law partners as an ethical person.

Patrick J. Schiltz, On *Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 908-910 (1999).

Suggested Classroom Learning Activities

1. Set Up: Reporting on Research

(Research problems; Outcomes 2-b, 2-c)

If you have assigned research or interviews to be due this class, one way to begin the class is to ask students to share some of the products of their work or, if they have turned in the assignments with sufficient time for you to review them, report on the themes you saw.

2. Set Up: Reviewing Quiz Results

(Section 2.3 & Rule 8.4; Outcome 2-b)

Likewise, if you have assigned a pre-class quiz, students will be anxious to have you address the answers before any further learning occurs. I sometimes assign the CALI lesson on Bases for Discipline, cited on page 49. I then distribute the following handout or email to the students:

What was I supposed to get out of that CALI lesson?

1. Be able to read the rule rules and comments and make text-based arguments from those rules

a. Close reading of the rule (e.g., Rule 8.4(b) criminal act—rule says it is misconduct to "commit a criminal act"—not "be convicted of a criminal act"—so a charge and conviction are not necessary)
b. Application of rule to facts (e.g., apply "through the acts of another" to a fact situation)
c. Analysis of structure and authority of a rule (e.g., argue the impact of a comment in the interpretation of a rule (not binding but persuasive))

2. Learn some key interpretations of Rule 8.4
   a. Misconduct can be based on conduct not otherwise expressly governed by other disciplinary rules, conduct not otherwise prohibited by law, and conduct while in one's private capacity.
   b. Burden of Proof is on the state in discipline but on the applicant in admission
   c. Courts have generally upheld the broad and open-textured language of rule 8.4 as constitutional
   d. Discipline is not punishment, but protection of the public, so double jeopardy does not apply.

3. Be able to identify and argue some of the tensions in defining misconduct
   a. Broad v. narrow construction of the rules (e.g., if an attorney violates a rule he or she believes is unconstitutional or otherwise invalid, will the attorney be subject to discipline?)
   b. Predictability v. Discretion (e.g., what is criminal conduct that "reflects adversely on … fitness as a lawyer"? what is "conduct prejudicial to the administration of justice"? Should these standards be more clearly defined or is an open-textured rule better?)

4. Be able to consider some of the practical influences on administration of a discipline system
   a. Degree of risk to the public
   b. Costs of investigation and prosecution
   c. Alternatives to discipline (e.g., lawyers assistance programs)

3. Set Up: Reporting and Brainstorming

(Section 2.5; Outcome 2-b)

Starting out by emphasizing the breadth of regulation is a good way to reinforce the central goal of the chapter. If you assigned students to bring an of lawyer misconduct to class, ask one or two student to share their examples. Since this is an assignment I ask students to complete throughout the semester rather than just for one class, I use this class as an opportunity to model the way I want them to report these examples. I present a recent example of attorney

misconduct that could have resulted in criminal or civil liability and discipline. (I review the ABA/BNA Lawyer's Manual Current Reports volume and the state lawyer news publication.) I then identify all the consequences of the attorney's actions, identifying the precise source of law that would result in sanctions or liability.

When students make their own reports, one of the issues I look for is precision in identifying sources of law. So, for example, if the students answer that the attorney could get disbarred, push them to identify the source of law that would provide for disbarment. Often students will answer "The Model Rules" which allows you to emphasize the role of the ABA. Likewise, students will assume that any attorney misconduct will result in malpractice, when in fact some misconduct, such as revealing confidential information or overbilling, would not state a claim for malpractice, though it would for other civil and criminal activities.

4. Set Up: Debate

(Section 2.5; Outcome 2-b)

If you choose to emphasize policy choices in disciplinary systems, an effective way to frame the discussion is to begin with a debate about regulation. You can provoke this debate even further by referring students to recent blogs or editorials on the regulation of attorneys. Ask students, "Should lawyers be regulated at all?"

Some points the students might make:

Pro:

- Some legal services could be provided with less expense and just as high quality by non-lawyer professionals
- Regulation of lawyers can be used as an indirect regulation of their clients' ability to access the legal system (Milavetz)
- Self-regulation is simply guild protectionism—the profession doesn't regulate themselves well at all
- Lawyers could still distinguish themselves based on their education or other credentials; it simply wouldn't be required to have those credentials

Con:

- The public does not understand what lawyers actually do or what makes a good or bad lawyer.
- Lawyers play a role in our legal system that is different than that of any other industry—particularly in the dispute resolution system. The close connection between the courts and lawyers requires that their regulation be independent of partisan politics. In fact, "deregulation" would pose constitutional issues—federal guarantees of right to legal counsel, state court inherent (and sometimes constitutional) authority to regulate the profession.

- Deregulation would simply aggravate class divisions—the wealthy would still be able to afford real attorneys, but we would increasingly fool ourselves into believing that the poor only need bureaucratic form services to meet their legal needs.

Summarize the debate by emphasizing that, despite calls for de-regulation, what has been happening is actually increased regulation from more sources.

5. State the Rule Minute Paper on Rule 8.3
(Section 2.4, Research Assignment 2-b; Outcomes 2a and 2c)

I have found that using brief short answer or minute paper assessments in class is very helpful in assessing student understanding of rules. I ask students to write in their own words (or chart, graph, fill-in-the blank) a rule from memory.

Display either your own jurisdiction's version of Rule 8.3 or ABA Model Rule 8.3 on a screen or ask students to look at the rule from their rule supplement. Give them 45-60 seconds to review the rule. Then, ask them to close their books (as you remove the rule from the display) and answer the following questions about Rule 8.3.

1. Whose conduct must be reported?
2. What does an attorney have to report?
3. When does the reporting duty arise? In other words, how sure must an attorney be in order to have to have a duty to report?
4. When must the report be made?
5. To whom must the report be made?

Comments
1. Students often overlook the judicial reporting requirement of 8.3(b).
2. Students rarely have memorized the standard and will often leave out part of it (e.g. "substantial" or "fitness in other respects"). They also will overlook the exceptions to the rule from 8.3(c).
3. While the "knowing" standard is difficult to apply in practice, students should at least be able to identify that as the standard. Very prepared students will be able to recite the standard from the Riehlman case: "where the supporting evidence is such that a reasonable attorney under the circumstances would form a firm belief that the conduct in question had more likely than not occurred."
4. Again, the uncertainty of the "promptly" standard from the Riehlman case can be discussed further, but students should at least be able to produce this standard.
5. Students will often say "the bar"—it is helpful, particularly if your state does not have an integrated bar, to use this occasion to correct the students' understanding about the relationship

between a state bar association and the state court.

6. Discussion of Reporting Obligation
(Section 2.4, Research Assignment 2-b; Outcomes 2a and 2c)

The margin question on page 29 raises the issue of reluctance to report other attorneys. I use this question as an opportunity to explore defective moral reasoning (or, as I refer to it in class "quibbling"). I am influenced in working on this issue by the presentation, *Guided by Theory, Grounded in Evidence: A Way Forward for Professional Ethics Education* by Muriel J. Bebeau, Ph.D., and others, presented at the Spring 2009 Workshop of The National Institute for Teaching Ethics & Professionalism, available at http://law.gsu.edu/niftep/s09workshop.html# program.

I ask students to identify the reasons that an attorney in Riehlman's position might give for failing to report. I then ask students to rate which of those reasons would be the most virtuous and which are simply rationalizations for otherwise purely selfish behavior.

Many students may suggest that friendship or compassion are important reasons in this case. I take this as an opportunity to share the research indicating that individuals who are trying to help someone else may be more likely to break rules or cheat to do so.[44]

Other students might suggest that fear is at the base of an attorney's reluctance to report—the fear of being ostracized as a "snitch." This can provide an opportunity to discuss moral courage and the counterbalances that might cause an attorney to overcome that fear—anger at the situation of an innocent person put in prison simply because of the pride or drive to win of an attorney, or guilt about having this information and doing nothing.

Similarly, you can use this question to discuss the importance of a moral culture. Question 2 after the *Riehlman* case [you can discuss here or in the context of the hypotheticals in part 4 below] "How can you know whether you are joining a firm that is likely to demand that you engage in or cover up unethical conduct?" Some suggestions are: Structural factors: ask about billable hours; Turnover: talk to former attorneys; Presence of ethics counsel or committee and procedures for ethical concerns; Research disciplinary record of attorneys in the firm (increasingly easy as more states are making their disciplinary proceedings more public).

Finally, you can also use this discussion to ask which version of Rule 8.3 is most likely to provide the clearest statement of duty so as to promote compliance.

[44] DAN ARIELY, THE HONEST TRUTH ABOUT DISHONESTY: HOW WE LIE TO EVERYONE--ESPECIALLY OURSELVES (2013).

7. Discussion of In re Riehlmann (La. 2005) and Whitworth (Oklahoma 2011)
(Sections 2.4 & 2.5, Outcomes 2a and 2b)

I combine the discussion of these cases and tend to keep it rather brief, asking only a few of these questions, so that we have time to apply the lessons from these cases to one or two new problems. If you prefer to engage the students in the cases more fully, this entire set of questions might be useful.

Questions about Sanctions and the Discipline Process

Q. Do you agree with the sanction in the *Riehlman* case? Polling (agree, should have been harsher, should have been more lenient) Ask for a few explanations from each group.
A. Reinforce student responses by reference to the ABA Standards for Imposition of Sanctions.

Q. In this case, the court finds that the attorney's conduct was negligent rather than intentional and that affects the court's selection of a sanction. It characterizes his substantial experience as an "aggravating factor." What other factors should a court consider in choosing a sanction? Should it be aggravating or mitigating?
A. Students will likely generate a number of factors. You can summarize these and relate them to those identified by the ABA's Standards for Imposing Lawyer Sanctions.

> Standard 3.0: "In imposing a sanction after a finding of lawyer misconduct, a court should consider the following factors:
> (a) the duty violated;
> (b) the lawyer's mental state;
> (c) the potential or actual injury caused by the lawyer's misconduct; and
> (d) the existence of aggravating or mitigating factors."

Q. *Remorse*—Should an attorney's remorse influence discipline? Notice how important both Riehlmann and Whitworth's attitude toward the process was to the decision. Standard 9.22 (g) lists "refusal to acknowledge wrongful nature of conduct" as an aggravating factor and Standard 9.32 (l) characterizes "remorse" as a mitigating factor. Why should remorse be so influential a factor? Doesn't this deter attorneys who believe they did nothing wrong from defending their case?
A. I take this opportunity to emphasize to students that the very worst response they can make to a disciplinary case is to ignore it and the second is to go on the offensive. Respectful defense doesn't preclude favorable decisions on sanctions, but arrogance is deadly.

Q. If an attorney violates a rule he or she believes is unconstitutional or otherwise invalid, will the attorney be subject to discipline?

A. No: Comment 4 to Rule 8.4. That comment indicates that a lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. Rule 1.2(d) allows attorneys to counsel their clients that a law may not be valid and act accordingly; so attorneys should be able to engage in that analysis for themselves as well. After all, sometimes the only effective way to challenge existing rules is within the context of their attempted enforcement. Moreover, if the rule is indeed unconstitutional, the exercise of authority under that rule is illegitimate and should not be supported.

Yes: Attorneys, as a self-regulated profession, do have a broader ability to change their own rules. An attorney moreover, should have a greater obligation to uphold the rule of law. Providing an escape from discipline based on an individual attorney's decision that a rule is a practical matter—when faced with a rule that you believe is invalid, you must weigh the costs of compliance against the costs of challenging the rule through violation. Few attorneys believe that challenge to be worth the costs. The area of advertising has been the most fertile ground for these challenges.

Q. The court noted that Whitworth was "Practicing law during the week and working at Lowe's part-time on the weekends will permit him to be home more evenings a week and provide stability and predictability for his family." Why is this relevant to his fitness to be reinstated?

A. This is a good point to reinforce the "prediction"/ "protection of the public" function of the disciplinary process. In a purely "punishment/compensatory" oriented system, this would be irrelevant.

<u>Questions about Addiction/Stress and the Work-Life Balance Issues in These Cases</u>

[You can address these issues through a discussion of these cases or in the context of an additional hypothetical (see section 4 below).]

Q. Neither Riehlmann nor Whitworth appear to be evil people. Riehlmann made his choices under the stress of watching a friend die, going through a divorce, having his toddler have open-heart surgery, and suffering from depression. Whitworth suffered from addiction. Standard 9. 22(k) lists "illegal conduct, including that involving the use of controlled substances" as an aggravating factor but Standard 9.32 lists among its mitigating factors:

(c) "personal or emotional problems"

(i) "mental disability or chemical dependency including alcoholism or drug abuse when:

(1) there is medical evidence that the respondent is affected by a chemical dependency or mental disability;

(2) the chemical dependency or mental disability caused the misconduct;

(3) the respondent's recovery form the chemical dependency or mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and

(4) the recovery arrested the misconduct and recurrence of that misconduct is unlikely;

Do you agree that these types of medical conditions should be mitigating factors? Why or why not?

A. This can be a touchy question, given the likelihood that you will have some students in recovery in your classroom and others who view addictions as a moral failing or personal weakness. How you frame this discussion will be very important to maintaining a respectful dialogue rather than a polarizing statement of assumptions and personal opinion. I always precede such a dialogue with a caution that we use respectful language and ground our arguments in fact rather than assumptions. I more often will summarize the debate briefly and come back to the issue at a later date in the course when we have more practice at discussion of sensitive subjects.

Another way to address this issue is the following question:

Q. In the *Whitworth* case, the court had a Rule 6 proceeding is discipline for misconduct and a Rule 10 proceeding is a proceeding for unfitness. Why do you suppose the court separates these?

A. Different problems require different procedures. While addictions or other disabilities are a common cause of the behaviors that cause discipline, the behaviors are ordinarily the basis for discipline rather than the addictions. An attorney may be unfit to practice but may not yet have committed misconduct, or the misconduct he may have committed may not be, by itself, a sufficient basis for suspension, even though that is what is required by the circumstances in order to protect the public. Fitness problems are rarely issues that can be resolved by either punishment or education, but require more specialized intervention. Especially when an attorney's misconduct is the consequence of addiction or illness, separate proceedings can address the unique nature of these problems, while also recognizing the severe harm to all clients that can result from these circumstances. Many states have immediate interim suspensions and summary proceedings in circumstances in which an attorney's fitness is at question. The nature of those proceedings often vary from disciplinary proceedings. For example, Rule 10.12, Rules Governing Disciplinary Proceedings, 5 O.S.2011, Ch. 1, App. 1–A, provides that disability proceedings are confidential unless otherwise ordered by the court.

Q. Textbook asks: Why did he have a duty to report his addictions?

A. The answer is not entirely clear to me. Some plausible explanations for a source of such a duty are:

- from a broad reading of Rule 8.1 (Bar Admission & Disciplinary Matters) as applicable to reinstatement petitions and considering the need to disclose the

addictions in order to avoid the rule's prohibition "fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter,"

- from Rule 11.1, Rules Governing Disciplinary Proceedings in which the rule requires that petitioner "supply such support proof of personal capacity as may be necessary,"
- from the requirements for reinstatement, if those requirements include completing another C&F application, which question 26. A. ("Do you currently have any condition or impairment (including, but not limited to, substance abuse, alcohol abuse, or a mental, emotional, or nervous disorder or condition) which in any way currently affects, or if untreated could affect, your ability to practice law in a competent and professional manner?"), or
- from the discovery/investigation process in this particular proceeding, in which Whitworth may have been asked about addictions.

Questions about Practical Aspects of the Disciplinary Process

Q. What could you have done if you were Whitworth's friend and started to see the problem?

A. Don't bail him out or take anything away from his responsibility.
Advise him to talk to a Lawyer's Assistance Program.
Refer him to a Substance Abuse Intervention Committee if your state provides for this avenue.

Q. What are some things that a disciplinary counsel might do if he or she is concerned about an attorney's behavior or about a client's complaint but doesn't believe prosecuting a disciplinary charge is appropriate?

A. Refer the client to the client protection fund.
Refer the client to mediation.
Refer the client to another attorney.
Refer the attorney to mediation.
Refer the attorney to a lawyers' assistance program (show website of a state LAP and discuss briefly).
Enter into a diversion agreement with the attorney (discuss possible terms).
Issue a private reprimand (ask, "What good is that?").

8. Choose or Critique a Sanction

(Section 2.3, pages 25-27; outcome 2-b)

The text provides some multiple choice problems to practice in Section 2.3. You can ask students if they have questions about those problems and then pose additional problems for student to discuss. Preceding discussion with polling of opinion (through raised hands, clickers,

or some other voting mechanism) can allow you to direct conversation to reflect varied opinions in the classroom and support minority opinions in order to generate discussion.

1. You are an associate in a medium-sized firm in your state. One of your partners is Romeo. You had referred a friend Dolores to Romeo to represent her in her divorce. Now Dolores has come to you asking for a referral for another attorney to take over representing her in her divorce case because Romeo has said that he cannot continue to represent her. You ask why and learn that Romeo and Dolores have fallen in love and begun an intimate relationship (they were strangers before she hired Romeo to represent her) and Romeo has told her that he can't continue to represent her. Dolores has asked that you not say anything to anyone about her relationship with Romeo because she is afraid it might hurt her in her divorce.

Q. Assume your state has <u>not</u> adopted ABA Model Rule of Professional Conduct Rule 1.8(j), which provides "A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced." Would Romeo be subject to discipline? If so, what kind of discipline would you recommend?

A. Even without this rule, courts have recognized that commencing a sexual relationship with a client can impair independent professional judgment and constitute a conflict of interest, especially in a divorce case in states in which sexual misconduct can be considered in the divorce.

Q. Assume your state has adopted Rule 1.8(j). Must you report Romeo to the state disciplinary counsel?

A. The short answer is no because the client does not want the information disclosed. Students too easily forget the exception to the reporting duty and this problem makes a great example of how forgetting that exception could cause a client real harm. If the students do recognize this exception right away, ask them to assume the client will consent to the disclosure so you can engage them in the discussion of whether this is conduct that reflects on Romeo's "honesty, trustworthiness, or fitness to practice." The problem raises the interesting question of whether this permits an attorney to make their own assessment of intent or motive in interpreting the meaning of rule violation that itself has no state of mind requirement.

Q. Suppose that you help Dolores to file a complaint against Romeo and Romeo then fires you. Do you have a cause of action for retaliatory or wrongful discharge?

A. You can use this question as an opportunity to hold a discussion about making difficult choices to report a supervising attorney given the uncertainty and cost involved in a lawsuit after losing a job. If you have not otherwise addressed Question 2 after the *Riehlman* case ("How can you know whether you are joining a firm that is likely to demand that you engage in or cover up unethical conduct?"), this would be a good opportunity to do so. Students are frightened of the

circumstances in which they might be required to report another attorney, particularly in their own firm. They often will emphasize the risks of reporting and discount the risks of keeping quiet, which include not only discipline but being the "fall guy" for any misconduct that is uncovered.

2. Patrick P is an attorney. Patrick decided to play a practical joke on Clarence C., a former high school classmate who is now a high school teacher. Patrick had heard some rumors about Clarence's inappropriate behavior toward his female students. As a practice joke, he created a page on the "Classmates" social networking site posing as Clarence. He then posted a message that said:

> Hey all! How is it going. I am married to an incredibly beautiful woman, AND I get to hang out with high school chicks all day (and some evenings too). I have even been lucky with a few. It just doesn't get better than this.

The posting led to an investigation against Clarence by both the school district and the local prosecuting attorney. Parents wrote angry letters to Clarence and the school about the posting. Clarence was able to convince the police and the school officials that he had not created the site after Patrick admitted that he had created it.

Q. Is Patrick subject to discipline? If so what kind of discipline would you recommend?

A. This is not a case that needs a great deal of discussion but is helpful for emphasizing that online conduct, even in one's personal life, can bring discipline. This problem is based on *In re Carpenter*, 95 P.3d 203 (Ore. 2004), where the Supreme Court of Oregon held that, the attorney's conduct, in impersonating another and posting disparaging comments (even if true), created a significant risk that his classmate's legal rights as a teacher would be adversely affected. The court found this to violate Oregon DR 1-102(A)(3) (prohibiting dishonesty, fraud, deceit, and misrepresentation) and issued a public reprimand. The court was not persuaded by the attorney's "it was just a joke" defense. *In re Carpenter*, 95 P.3d 203 (Ore. 2004).

3. Bill was an associate for four months at the Windhorst firm and, while there, worked very briefly on a contingent fee, personal injury case for Ms. Curtis. Bill then left the Windhorst firm and joined the XYZ firm, which was representing the other side in the Curtis lawsuit. In response, the Windhorst firm brought a motion to disqualify XYZ and Bill from the Curtis suit, due to a conflict of interest (assume that this is indeed a conflict). Bill told his supervising attorney, who was defending the disqualification motion, that he had only worked on the Curtis case for one hour and that the 15 hours reflected in the time records at the Windhorst firm were inaccurate. Bill explained that the senior associates at Windhorst who were assigned to mentor him had instructed him to pad his bills in order to meet the inordinate billable hours requirement of the firm. Bill concluded that doing so in a contingent fee case was not harmful to the client, because

the client does not pay bills in contingent fees cases. In light of this information, Bill's supervising attorney decided not to fight the disqualification motion and withdrew from the Curtis case.

Q. Is Bill subject to discipline? If so what kind of discipline would you recommend?

A. Students should be able to recognize immediately that this is a violation of the rules under Rule 8.4(c) if no others. Every now and then a student will ask "How would anyone know if the attorney didn't admit it?" which can make for a great segue into the costs of deception and the "it's not a violation if I can get away with it" interpretation of the rules. If students do not raise the "following orders" defense, be sure to ask what difference it makes whether he was taught to do this or he thought it up himself. (This is obviously not a "reasonable resolution of an arguable question"). You can share the ABA Standards on this question with the students. This violation would fall under Standard 7.0, where the factors are state of mind and injury

Knowing + serious injury or potential injury = disbarment
Knowing + injury or potential injury = suspension
Negligent + injury or potential injury = reprimand
Isolated Negligence + little or no injury = admonition

In the case upon which this problem is loosely based, the firm attempted to defend the disqualification motion by having the attorney submit an affidavit admitting that he had padded his bills.

> According to respondent, while he was associated with the Windhorst firm he "padded" his timesheets with hours he did not actually work. Respondent explained that he did so because he "frequently had too little work to do to occupy all my time," and that when he brought his concern to the partners, he was "encouraged, both specifically and by implication, to 'pad my bills.'" Believing "it is wrong to bill clients for work that is not done," but fearing he would lose his job if he did not do so, respondent decided to "pad" my bills in the plaintiff's personal injury contingency fee cases on which I was working by logging time that I did not actually work. I felt this was the most acceptable solution to my dilemma, because (a) bills in [Pg 3] plaintiff's personal injury contingency fee cases are not paid by the client, so there was no real damage done to anyone by a "padded bill," and (b) when my total hours were checked by the partners of the firm, the amount would be high enough to keep my job. While this was not a perfect solution to a tough dilemma, it was the best, in my view, under the circumstances. Therefore, to the extent that his timesheets from the Windhorst firm reflected more than one hour of work on the Curtis case, respondent explained in his affidavit that it was "simply work that was logged but not done… to satisfy the billing requirements of the firm to save my job."

On the question of sanction, the court noted:

> Respondent's actions did not result in actual injury to Ms. Curtis, but did result in actual injury to the legal profession. By his actions, respondent has violated the ethical standards of the legal profession and has tarnished the image of the profession. Respondent also owes the public a duty to maintain standards of personal integrity. By misrepresenting the number of hours on his timesheets, respondent has failed to [Pg 8] maintain such standards. The baseline sanction for respondent's misconduct ranges from a public reprimand to a suspension.

The court ordered a 3-month suspension. *In re Lawrence*, 884 So.2d 561 (La. 2004)

Q. Are any of the attorneys at the Windhorst firm subject to discipline? If so what kind of discipline would you recommend?

A. Require students to point to the specific language in Rule 5.1 supporting discipline. They should separate the different levels of responsibility. This can be a good opportunity to model how to parse a rule, asking the students to generate the categories of persons the rule might hold responsible:

1. any attorney who:
   a. orders misconduct OR
   b. ratifies misconduct knowing it is improper
3. any attorney (regardless of standing in the firm) with direct supervisory authority who
   a. knows of the misconduct while it can be remedied and fails to take remedial action
   b. has not make reasonable efforts to have measures in place giving reasonable assurance that attorneys will conform their conduct to the rules.
5. any partner if he or she has not made reasonable efforts to have measures in place giving reasonable assurance that attorneys will conform their conduct to the rules.

Q. Does anyone have a duty to report misconduct?

A. This is clearly a violation with conduct that reflections on honesty and trustworthiness. Any attorney who knows of the conduct must report it unless they have learned of the conduct through confidential client information. This problem can cause the students considerable consternation if they happen to be in a firm where overbilling is a regular practice.

4. Attorney Rosanna has developed an effective technique to break down the defenses of witnesses in depositions. If Rosanna feels a witness is trying to avoid answering or is lying, she will raise her voice and use crude and obscene language to get a reaction—and thereby a more spontaneous answer—from witnesses. Dan was defending a case in which Rosanna was the opposing attorney. On cross examination, Rosanna began cursing at one of Dan's witnesses. Dan repeatedly objected and the judge not only sustained each objection but finally held Rosanna in contempt.

Q. Is Rosanna subject to discipline? If so, what kind of discipline would you recommend?

A. I was shocked when I gave this question on a final exam this semester to have some students suggest that there was no basis for discipline because cursing was, as one student put it, simply "a disagreeable personal habit, like poor grooming." This problem is an excellent opportunity to reinforce the standards of contempt (contumacious conduct) and the relationship between that conduct and "conduct prejudicial to the administration of justice."

Here are the cases that you can use to reinforce this lesson:

See *In re Stanley*, 507 A.2d 1168 (N.J. 1986)(rudeness directed at judge);

This case was decided under the Model Code of Professional Responsibility, however, it applied the predecessor to 8.4 "conduct was prejudicial to the administration of justice" DR 1-102(A)(5) among other rules. The court held that the attorney's language, constant interruptions, arrogance, and reactions to rulings "constituted undignified or discourteous conduct degrading to a tribunal" and was not a "mere isolated incident but occurred before three courts." Public reprimand issued.

In re McAlevy, 463 A.2d 315 (N.J. 1983)(using obscenities in court)

Attorney's use of obscenities in two different courts resulted in findings of contempt and fines. In the disciplinary action, the court found that the attorney "lacked common courtesy and civility expected from a member of the bar when appearing before any tribunal." Again, the case arose under the Model Code, specifically, DR 1-102(A)(5), conduct prejudicial to the administration of justice, DR 7-106(C)(6), undignified or discourteous conduct degrading to a tribunal, and DR 7-106(C)(7), the intentional violation of an established rule of procedure. The attorney was suspended for three months.

In re Coe, 903 S.W.2d 916 (Mo. 1995)(contumacious conduct during litigation).

In the course of a criminal conspiracy trial, the attorney was found in contempt for her reactions to adverse rulings and for stating in court that someone from the judge's office told a subpoenaed witness not to appear at trial. She was fined and even briefly jailed. In the disciplinary action, she defended on the grounds that there had been no delay of proceedings due to her conduct. The court held that "disruption should not be equated with delay." She also raised a free speech defense, which the court rejected. The attorney had been disciplined previously for similar misconduct, but the court imposed a public reprimand rather than suspension because she "had already been sanctioned for the misconduct, had no dishonest motive, and did not harm her client or any other member of the public."

Q. Does Dan have a duty to report Rosanna? Does it matter if the judge has said that he would be referring the matter to disciplinary counsel?

A. Students should recognize that each attorney has an independent duty to report, regardless of who else might have reported.

9. Case Discussion: *Milavetz*
(Section 3.5, Outcome 2-b)

Q. When does regulation reach lawyers? Sometime attorneys are simply a business and are subject to business regulation like anyone else. For example, an attorney is often an employer and is subject to all the laws that govern that relationship. Give examples of how an attorney might be acting as a business that would subject the attorney to regulation like any other business:
A. Students might recognize that attorneys can be regulated as corporate entities, tax payers, property owners, etc.

Q. After *Milavetz*, what do you think it would take for an attorney to successfully argue that a particular consumer protection statute does NOT apply to attorneys?
A. Answers might include: an explicit exclusion in the statute or regulations that strikes even closer to the core of the attorney-client relationship (e.g., compelled testimonial requirements that abridge the attorney-client privilege perhaps?) See also, Ted Schneyer, *On Further Reflection, How Our System of Professional Self-Regulation Should Promote Compliance with Broad Ethical Duties of Law Firm Management*, 53 ARIZ. L. REV. 577, n. 21 (2011): *See, e.g.*, *Am. Bar Ass'n v. Fed. Trade Comm'n*, 430 F.3d 457, 471-72 (D.C. Cir. 2005) (upholding an ABA challenge to the claim that the Gramm-Leach-Bliley Act of 1999 authorized the FTC to regulate law firms as "financial institutions"); see also Rhonda McMillion, *Let the States Do It: The ABA and Other Bars Are Working to Limit Federal Regulation of Lawyers*, A.B.A. J. NEWS, Dec. 1, 2010, http://www.abajournal.com/magazine/article/let_the_states_do_it_aba_working_to_limit_federal_regulation_of_lawyers/ (stating that "in a major victory for the organized bar," the ABA and twenty state and local bars convinced Congress to exclude lawyers from the class subject to key provisions in the Dodd-Frank Wall Street Reform and Consumer Protection Act, which regulates providers of consumer financial products or services). The ABA has also encouraged the U.S. Trade Representative not to negotiate trade agreements that "unreasonably impinge on the regulatory authority of the states' highest courts." ABA House of Delegates, Report and Recommendation 105 (Annual Mtg. Aug. 2006), available at http://www.americanbar.org/groups/professional_responsibility /resources/ lawyer_ethics_regulation.html.

Q. Why does the mainstream bar resists these federal efforts to regulate the legal profession?
A. Some answers students should be able to provide:

- Judicial/legislative tensions—Courts should regulate lawyers. State courts often use separation-of-powers doctrines to keep the other branches of government at bay; federal courts do not.

- State and federal policy in regulating lawyers sometimes conflicts. Congress and agencies are more likely to regulate lawyers as a way of regulating their clients' conduct. (Schneyer talks about this as "deputizing" lawyers as "gatekeepers to monitor their clients' compliance with law." *See also*, JOHN C. COFFEE, JR., GATEKEEPERS: THE PROFESSIONS AND CORPORATE GOVERNANCE 192-247 (2006) (supporting the use of lawyers as gatekeepers in federal securities regulation); Susan P. Koniak, *The Law Between the Bar and the State,* 70 N.C. L. REV. 1389, 1409-27 (1992) (arguing that, unlike statutes and federal agency rules, judicial rules of professional conduct, drafted by the bar and construed in the bar's ethics opinions, exalt lawyers' duties to clients over duties to the public or third parties). "An innate conflict of interest exists on the part of the agency prone to impose novel obligations and novel theories of lawyer regulation upon counsel *ex post* in an effort to deputize the private bar to assist the agency in performing its appointed regulatory tasks." Keith R. Fisher, *The Higher Calling: Regulation of Lawyers Post-Enron,* 37 U. MICH. J.L. REF. 1017, 1128 (2004).

Q. What constitutional issues are raised by federal regulation of attorney conduct?
A. Commerce clause. (Is attorney advice "interstate commerce"?) Supremacy Clause. (*See, Sperry v. Florida ex rel. Fla. Bar*, 373 U.S. 379, 403-04 (1963) holding that, under the Supremacy Clause, state was without power to prosecute for violation of state unauthorized practice statute non-lawyer practitioner properly admitted to practice before U.S. Patent Office); First Amendment (Is regulating attorney advice content discrimination?)

Q. Would violation of the Bankruptcy Act result in discipline?
A. Not under 8.4 unless "conduct prejudicial to the administration of justice" or was an independent violation of the rules.

10. Closure: Brainstorming Areas of Law

Use the "Test your Understanding" problem at the end of the chapter and ask students to list the areas of law they believe would be relevant to the problem. Some of the areas of law the students should suggest include:

- Discipline
- Breach of fiduciary duty
- Contract defenses (unconscionability, etc.)
- Fee forfeiture
- Malpractice
- Breach of statutory requirements for these types of transactions

Chapter Three: Who Should Be a Lawyer?

Students are highly motivated to learn the materials in this chapter as it is information they need to apply for the bar. The major challenge that some students have with this chapter is their resistance to the scope of regulation. Many students do not appreciate (either in the sense of understanding or in the sense of agreeing with the idea) that a license to practice law is a privilege not a property interest purchased by three years of legal education. If this is an issue you would like to focus on in this class, you might consider assignment all or a portion of Chapter

I find that students are quite willing to self-teach the basic doctrine and rules on admission, at least in their own jurisdiction. Therefore, I use class time for this class to begin study of client communications by having the students conduct an initial client interview with a bar applicant. The exercise reinforces the skills of client interviewing while also raising the key difficulties of the broad "character" requirements for admission. If you don't wish to use this problem, I suggest using class time to reinforce the question of professionalism and the difficulties of predicting which applicants will be unfit or unethical.

Outcomes, Assessments, and Assignments

Outcome 3-a: Reading and Analyzing Lawyer Regulation

Students should be able to describe examples of the routes to admission to practice law in most states and the qualifications necessary for admission to practice law in most states; evaluate the risks that conduct would preclude admission based on character and fitness issues, and explain whether that same conduct, if engaged in by a practicing attorney, would subject that attorney to discipline.

Reading Assignment:

Chapter 3, Rule 8.1 of the Rules of Professional Conduct

Assessment:

Understanding of the standards is easily evaluated through a brief quiz and an opportunity for questions.

Here is an example of an incomplete outline to distribute with directions for students to complete the outline for class. You need provide only a very brief feedback, answering questions for aspects that confuse students.

Incomplete Outline—Chapter Three

1) Source of law governing admission
   a) Attorneys are admitted to practice law in the first instance by state _____.
   b) The U.S. Supreme Court held that residency requirements for admission violate _____ of the United States Constitution. *Piper v. New Hampshire Supreme Court*, 470 U.S. 274 (1985), *Virginia Supreme Court v. Friedman*, 487 U.S. 59 (1988), and *Barnard v. Thorstenn*, 489 U.S. 546 (1989).
   c) Federal Admission
      i) The authority of federal courts to control lawyer conduct is independent of state law; however, for an attorney to be admitted for the first time before a federal district court, the attorney must be _____.
2) Courts admit attorneys - Unlike licensing for other professionals, which is a legislative matter, the licensing of attorneys in most states a matter in the primary (if not exclusive) control of the supreme court of the state.
   a) This judicial power is not, in most states, conferred by the constitution but is considered an _____ power of the court, which vest in the courts upon their creation. *Anderson v. Dunn*, 19 U.S. 204, 227, 5 L. Ed. 242 (1821); *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630, 8 L. Ed. 2d 734, 82 S. Ct. 1386 (1962).
   b) Most state courts hold their authority to regulate the practice of law is exclusive. If legislation regulates attorneys, courts often find that the statutes _____.
3) Alternative methods of admission
   a) Admission by motion—Most states require that an attorney have a number of years of practice, be in good standing in their licensed state, and that their licensed state _____.
   b) Pro hac vice admission is designed for practice before a court on a _____ basis.
      i) Privilege not a right
      ii) Most courts will require that I associate with a local attorney.
   c) Admission before administrative tribunals
      i) Patent and Trademark Office has separate admission standards and requirements
      ii) The Agency Practice Act prohibits most agencies from setting up separate admission standards. 5 U.S.C. §500 (1997).
      iii) But separate agencies may have separate standards of practice allowing for sanction (for example _____)

4) Requirements for Admission to practice before states
   a) Law degree. In nearly all states the degree must be from an _____ law school
   b) Bar exams
   c) _____
5) Duty to Assist in Bar Admission Process
   a) Rule 8.1 of the Model Rules of Professional Conduct prohibits, in connection with a bar admission application, knowingly _____ or failing to _____.
   b) Civil immunity—Even if the letter could pass the common law standards for defamation, in most jurisdictions there is immunity from civil liability for _____.

I do not usually test heavily on the admissions materials per se in the final examination, but the underlying ideas of authority of the courts and broad open-textured standards are central to their ability to analyze most questions.

Outcome 3-b: Researching Issues in Professional Responsibility ⓘ

Students should be able to research the particular requirements for admission in your state.

Research Assignment:

Complete Research Assignment 3-A (page 68). (Ask students to research the requirements for admission in the state in which they plan to practice.)

Assessment:

The key assessment necessary is to insure that students learn to go to the primary source rather than rely on research guides alone. If your state has made recent changes to its admission rules, you can reinforce the key skill of insuring currency of research by asking students to research the particular issue for which there has been a recent change.

Outcome 3-c: Communication Skills 

Students should be able to interview a bar applicant to gain information necessary to identify character and fitness concerns and provide some basic counseling about how to best address those concerns.

Assignment:

Professional Responsibility Skill 3-A, pages 69-71

Rather than use this class period to review admissions standards, I devote the class time to an exercise in interviewing a bar applicant.

If your students have had no introduction to active listening or the initial client interview, you may wish to supplement the preparatory assignment with a short reading assignment on these skills. I assign a CALI lesson on Active Listening I have written on the subject (this is not available through CALI at this time, but you can assign it using the URL from my own website: http://law2.umkc.edu/faculty/profiles/glesnerfines/ cali/listen).

Suggested Classroom Learning Activities

1. Set Up: Why Regulate Admissions?

(Section 3.1; Outcome 3-a)

A few basic overview questions can set up the discussion of admissions.

Q. What are the purposes of an admission system?

- To require minimum levels of competence
- To create affirmative standards of conduct or reiterate requirements of general law
- To protect clients who do not know the law
- To protect clients from fraud, mishandling of funds, betrayal of confidences, etc.
- To protect courts and the administration of justice from subornation, misrepresentation, bribery, etc.
- To protect image/reputation of legal profession
- To protect profession from external regulation
- To control supply of legal services

Students will be able to generate some, but rarely all of these. An alternative way to begin the class is to provide the students this list of purposes and ask them to rank order them in terms of the degree to which they drive admissions rules and decisions.

Q. If you are conducting the interview exercise, you can also set up the exercise by asking students to explain the relevance of good interviewing and counseling skills to fundamental duties of the attorney. Some examples they might provide include:

- Rule 1.1 Competence means getting the story
- Rule 1.2 Client-centered representation requires a relationship
- Rule 1.4 Communication is required

- Rule 1.5; 1.6; 1.7 Some required communication in every first interview (fees, confidentiality, conflicts)

2. Quiz Questions

(Section 3.1; Outcome 3-a)

For online pre- or post-class review of doctrine or for in-class quizzes, a brief quiz can help students assess their understanding of the basic rules.

TRUE/FALSE QUIZ ON REPORTING (Rule 8.1)

Professor Bea Geeff is licensed in YourState. Sam Student worked briefly for Prof Geeff as a research assistant for the summer, but was so difficult to reach and so slow in returning research that Professor Geeff found a new research assistant during the fall semester. Student did not ask and she did not explain why she had not continued his employment. Based on Student's performance in Professor Geeff's class, her opinion of him fell even further. Student got top grades on final exams but Professor concluded that Student is irresponsible and dishonest based on his behavior in her class (always arriving late, regularly unprepared for class, and providing unbelievable excuses for absences and missed assignments). Student graduated and applied for admission to practice law in YourState. On his application his listed his summer employment with Professor Geeff. As a consequence, the YourState court sends Professor a standard reference form. In answer to the question, "would you hire this person again" she answered "No" and provided the examples of his behavior and her opinion of his professionalism. True or False?

True False 1. Student has the burden of proving his good moral character and fitness for bar admission.

True False 2. Professor would be subject to discipline if she did not respond to the state court's request for a reference.

True False 3. If the state court had not requested a reference from Professor, she would nonetheless be subject to discipline if she did not provide the information about Student to the bar.

True False 4. Professor is immune from liability for defamation arising out of her statement to the admission authority.

True False 5. Sam's conduct in regard to his behavior cannot be considered a basis for denying his admission because he was not fired and was not subject to academic discipline.

Answers:

1. True

2. True. She is a member of the bar and must respond to a lawful demand for information.
3. False. Without a demand for information, Professor has no independent duty to supply information about Student unless she knows of a misapprehension. Rule 8.1 does not apparently require attorneys to take affirmative steps to report facts about other applicants absent a demand or some other initial involvement. If the Professor was aware that the admission officials had a misapprehension about the applicant's honesty and failed to report facts necessary to correct that misapprehension, she would have violated Rule 8.1. Likewise, if applicant is successful in deceiving the bar, and the attorney knows that applicant obtained his license to practice based on fraud, deceit or dishonesty, the reporting obligations for Rule 8.3 would likely require him to take action.
4. True. Even if the reference report would establish a *prima facie* case of defamation, in most jurisdictions there is immunity from civil liability for statements made in the context of bar admission investigations.
5. False. States can use any evidence that is relevant to the issue of good moral character regardless of source or formality.

MULTIPLE CHOICE QUESTIONS FOR ADMISSION STANDARDS RESEARCH

Which of the following are required for ALL applicants to be granted a full admission (as compared to a limited admission) to the practice of law in [Your state]?

a. The applicant must have graduated from an ABA accredited law school or receive special permission from the Board of Bar Examiners to take the bar examination.

b. The applicant must be a resident of the state.

c. The applicant must have received a passing score on the MPRE.

d. The applicant must have received the approval of the board as to eligibility for admission and character and fitness

e. Five years must have passed since the applicant was convicted of a felony.

Answer:

You will need to be aware of your own state's requirements if you give students this question. Use the quiz to reinforce the student's research skills and the constitutional limitations on those requirements, for example, *Supreme Court of New Hampshire v. Piper 470 U.S. 274 (1985*)(residency requirements violate privileges and immunities clause).

3. Discussion of *Lane* and Problem Sets: Procedural Aspects

(Section 3.2, Outcome 3-a)

Students often have strongly felt reactions to the Lane case and to the good moral character requirement, often based on deeply held political, religious, and epistemological opinions. Many are frustrated (or at least weary) by the comprehensiveness of the character and fitness application. Others are apprehensive that their own prior misconduct may bar their own admission. All of these factors can make the discussion of good moral character difficult to manage.

One way to manage the discussion is to clearly articulate what you want students to know about this requirement and why. I want students to understand that the admission process has a significant degree of discretion built into the process. Thus, I ease into the critique of the good moral character requirement itself by beginning with some questions about procedure. I then cover some of the main "character" issues raised by the case. You can use the entire Lane case to address these issues or give them more brief attention in the context of this case and develop them through the discussion of candidates following the case.

These questions can include:

Q. How did the admissions authorities find out about the behaviors they consider in the admission process?

A. You can use this question to emphasize the self-regulatory aspects of the admission's process and the duty to cooperate, along with the very broad authority of state courts to investigate even matters that would otherwise be closed (such as juvenile records). Be sure students understand that the applicant has the burden of proving good character.

Q. What is the standard for your duty to disclose information in connection with a bar application?

A. Sometimes students conceive the bar application process as a confessional, not recognizing that they are required only to "respond to a lawful demand for information" and "disclose facts necessary to correct misapprehensions known by the applicant to have arisen." Model Rule 8.1. On the other hand, just because you are not required to disclose a particular issue, doesn't mean that the character and fitness committee must ignore information it independently discovers.

Q. What are some of the factors that admission authorities consider in deciding whether any particular evidence of poor character should be enough to deny admission?

A. You can ask the students to generate a list here and then compare it to the Nebraska Rules, which provide a comprehensive list.

1. the applicant's age at the time of the conduct;
2. the recency of the conduct;
3. the reliability of the information concerning the conduct;
4. the seriousness of the conduct;
5. the factors underlying the conduct;
6. the cumulative effect of the conduct or information;
7. the evidence of rehabilitation;
8. the applicant's positive social contributions since the conduct;
9. the applicant's candor in the admissions process;
10. the materiality of any omissions or misrepresentations.

In re Roseberry, 270 Neb. 508, 516-517 (Neb. 2005)

The *Lane* case and the candidate discussion issues following the case have some overlap. You can discuss the issues in terms of Lane and then note that the same issues apply for the candidates or you can move right to the candidates and integrate the discussion of Lane into consideration of the candidates.

Lane case	Candidate in Problems
Failure to disclose employment and bar admission	Candidate B
Obnoxious behavior and unwillingness to work with women	Candidate C
Paranoia	Candidate G

There are several ways to discuss these candidates, with the biggest challenge being the time necessary to discuss each. Some approaches:

- Divide the class into groups and have each group prepare a brief report to the class on whether the candidate would or should be admitted and why
- Call on individual students to present arguments for and against each candidate's admission.
- Poll the class (especially if you use clickers so that polling can be anonymous) on whether the candidate should be admitted.

Whichever approach you take, it is helpful to address the uncertainty of prediction in these cases. You can begin with two overview questions.

Q. What are some of the arguments for and against these broad standards "good moral character/conduct prejudicial"?
A. Students enjoy this policy debate. The key tensions of course are between the need to protect the public and the difficulties in discovering misconduct and disbarring attorneys once

licensed on the one hand and the difficulties of prediction and the misuse of discretion to further purposes other than protecting the public on the other hand. If you ask for "the arguments" rather than student positions, all sides of the debate can be explored efficiently and effectively. You likely will need to cut off the debate at some point by summarizing this as a continuing controversy in admission standards.

Q. How closely do or should the standards for admission relate to the standards for discipline?

A. There is a constitutional and procedural difference: A property interest is involved when you have a license—only an expectation when seeking admission. The state has the burden of proof in discipline but the applicant bears the burden in admission. The Model Rules do not speak directly to bar admission standards, but they do set forth discipline standards that sound relevant to character. The Model Rules focus on conduct that has a functional relationship to the practice of law. Thus, Rule 8.4(b) refers to criminal conduct that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects. Rule 8.4(c) refers to conduct involving dishonesty, fraud, deceit or misrepresentation. Comment 1 states that a lawyer "should be professionally answerable only for offense that indicate lack of those characteristics relevant to law practice." The rules, however, do not make that line clear.

Some background and points to highlight on each problem follow:

Candidate A—Criminal behavior

Many states prohibit admission of applicants who have been convicted of certain crimes. A few states apply an automatic prohibition. Some, such as Florida, apply the bar forever unless civil rights have been restored to the convicted applicant. Missouri and Texas apply the bar absolutely until five years have passed after the completion of the sentence or probation.

While criminal convictions carry greater weight in the admissions process, mere arrests and even unsuccessful prosecutions can be the basis of denial. Whether one who advocates civil disobedience as a method of changing the laws has the character and fitness to practice law is an open question.

Candidate B—Failure to disclose

You can remind the students that one of the bases for denial of Lane's admission (in the main case) was his failure to disclose some of his employment history and his bar admissions. The court differed from the recommendations of the discipline committee on the issue of disclosure, with the committee finding there was no basis for denial of admissions based on failure to disclose because they did not find an intent to deceive; the Supreme Court rejected that intent standard and applied a reckless standard.

The case on which this is problem is based, *In re Strzempek*, 962 A.2d 988 (Md. 2008), raised similar issues. The Board recommended admission, having found that the candidate did not intend to deceive the board and that his "arrest, conviction and late disclosure were aberrations and there is no reason to believe the conduct will be repeated." The majority of the court reversed, concluding that his choice not to disclose violated the duty of complete candor. The dissent emphasized the credibility determinations that the Board likely made in arriving at its recommendation and the need for the court to defer to those findings.

For this issue, it is helpful to address student concerns about how far they must go to respond to a question. I regularly have students who can't remember the name or address of a former employer or who got a traffic ticket in another state several years ago but don't have the information about the ticket. The students are concerned about how far they have to go to avoid crossing the line to non-disclosure. My answer is to ask students to consider additional ways to investigate these facts (find old tax returns, run criminal background check processes, etc.) and then suggest that the practical standard is "do the best you can and explain your efforts."

Candidate C—Hate speech

This problem is one of the most controversial, as it touches on a politically, morally, and personally charged issue for students. Acknowledging that controversy up front and reinforcing norms of civil speech can help guide discussion. The problem is based loosely on the Hale case, involving racial hate speech. The article cited in the text, Emelie E. East, *Note: The Case of Matthew F. Hale: Implications for First Amendment Rights, Social Mores and the Direction of Bar Examiners in an Era of Intolerance of Hatred*, 13 GEO. J. LEGAL ETHICS 741 (2000) discusses that case, in which Matthew Hale was an outspoken white supremacist. Among the items in his application that caused concern were "being cited for littering because he placed fliers and newspapers on automobiles, for an overturned obstruction of justice charge, for various college disciplinary citations, for an assault and battery charge, for Hale being the focus of a protective order charge, and other similar small, but perhaps telling, charges." *Id*. at 743. The Board denied Hale's admission because the examiners believed the applicant's speech and actions predicted an inability to conform his conduct to the requirements of the profession.

The Illinois Court denied Hale's admission without discussion. *In re Hale*, 1999 Ill. LEXIS 1639 (Ill. Nov. 12, 1999), *cert. denied*, 530 U.S. 1261 (2000). A dissenting opinion argued that the court should have explicitly addressed the First Amendment issues raised by the case as well as the issue of whether conduct that does not violate a rule of conduct can be used to deny admission. *In re Hale*, 723 N.E.2d 206 (Ill. 1999).

You can refer back to the *Lane* case here. Besides failure to disclose information, Lane's other behavior that caused him to be denied admission included his statements to his professor

that she perceived as threats and his refusal to work with women. The dissent and majority in this case differed over the relevance of what the dissent characterized as "obnoxious and rude behavior."

This question allows you to link the broad standards of Rule 8.4 (conduct prejudicial to the administration of justice, manifestations of bias in the course of representing a client, etc.) with the "good moral character" requirement. You can emphasize the historically broad definition of moral turpitude used by most states and the risks these broad standards present for selective enforcement and denial of First Amendment rights. See, e.g., *Hallinan v. Committee of Bar Examiners, State Bar,* 55 Cal. Rptr. 228, 421 P.2d 76 (1966)(defining "moral turpitude," as "everything done contrary to justice, honesty, modesty, or good morals.")

A brief review of the Supreme Court precedent on this issue is warranted if you intend extensive discussion. *Konigsberg v. State Bar of California* 366 U.S. 36, *reh'g den*. 368 U.S. 869 (1959) held that the constitutional freedoms of speech and association do not justify a refusal to answer questions concerning political associations and beliefs, as these are relevant to a full investigation into moral character. The prior Supreme Court opinion in *Konigsberg v. State Bar of California,* 353 U.S. 252, *reh'g den.* 354 U.S. 927 (1957) held that the mere fact of membership in an organization advocating legal change (in that case the communist party) would not support an inference that an applicant does not have good moral character where there was no evidence that the applicant had actually supported the overthrow of the government or other illegal activity. In particular, the court noted that the applicant's public criticisms of legislative and judicial decisions could not be the basis for denying admission, since these expressions of political views are fundamental to a democracy. In *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971) the Supreme Court held that while a state may investigate the background of bar applicants for "good moral character," the First Amendment requires that questions about political advocacy or prior associations be limited to determining whether an applicant ever had the "specific intent" of acting violently or illegally.

Candidate D—Plagiarism

In the cited cases, the courts denied admission, with leave for the candidate to reapply at a later date.

Application of Widdison, 539 N. W. 2d 671 (S.D. 1995) has a great quote for students:

> With these great responsibilities to protect the public and ensure the ethics and professionalism of the bar in this State which it serves, we cannot accept the view placed in the record by a Law School faculty member in support of Widdison that this was merely a case of "senioritis." The failure to act in accordance with the rules is compounded by the failure to accept responsibility for these acts. The violations here are

> of the most serious nature as they go to the heart of the judicial system—the matter of personal legal ethics and trust. He acts at his peril who treats the rules for admission to the bar with the indifference accorded an unsolicited invitation to join a book club.

In re Bar Admission of Terry George Radtke, 601 N.W.2d 642 (Wis. 1999).

This case involved plagiarism while the applicant was a history professor.

Candidate E—Financial issues

Students become very nervous about this factor given the frequency of very high debt loads. An important point to emphasize is that significant debt itself is not the issue, but responsible handling of that debt is(e.g. ignoring bills rather than working out payment plans). Large debts and patterns of fiscal irresponsibility are treated as predictors for mishandling of client funds. However, courts do not require applicants to be debt free. They may require some efforts at payment, however. *See, e.g., Matter of Scallon*, 327 Or. 32 (1998).

Candidate F—Sexual activity

Again, this can be a very controversial issue, with the opportunity for selective enforcement easily highlighted by asking students how likely admission would be denied if the candidate was a single man who had an adulterous affair or had posed for a partially nude calendar to raise money for a charity. In *Florida Bd. of Bar Examiners Re N.R.S.* 403 So. 2d 1315 (Fla. 1981), the majority of the court held that private, noncommercial sex acts between consenting adults are not relevant to prove fitness to practice law; a dissenting judge noted that any sexual activity that is criminal (e.g., homosexual or other "licentious sexual activity") and routine violation of the criminal laws should be a basis for denial of admission.

Candidate G—Mental illness

The court in *Lane* characterized his behavior as "paranoid"—Suppose Lane had a diagnosis of a mental illness and he could explain his behavior as a consequence of that diagnosis? How should mental illness be treated in admission? This question recalls the discussion from the prior chapter about the effect of alcoholism and addiction on discipline. If you explored that issue at that time, you can simply remind students of the competing concerns. If you do not cover the admissions problems following the case, this would be a good opportunity to highlight the issue of using mental health questions on bar applications.

In *Clark v. Virginia Bd. of Bar Examiners* , 880 F. Supp. 430 (E.D. Va. 1995) the applicant refused to answer one of these questions and she was told she could not be licensed until she did answer. In fact, she once suffered from debilitating depression. While the court

noted that "uncontrolled and untreated mental or emotional illness may result in injury to clients and the public" it concluded that the Bar inquiry was too broad and could deter law students from getting mental health treatment when they need it. Accordingly it struck Virginia's version as overbroad under the Americans with Disabilities Act. The National Counsel of Bar Examiners has now changed its Question 28 to a more limited form, and in many states the new rules ask only about the applicant's current drug or alcohol use and whether the applicant has had any disorder that would impair the ability to practice law.

4. Closure: Summarizing Discretion

(Section 3.2, Outcome 3-a)

I provide a short lecture summarizing the following key points from the chapter:

Admissions systems serve multiple purposes. The primary articulated reason is the protection of the public. Prediction of future misconduct or unfitness is more speculation than science. These standards balance the risk that individuals who would be effective, ethical attorneys will be denied admission against the risk that individuals who would be unethical or incompetent will be admitted and will cause considerable harm before they can be removed at a later stage.

Admissions authorities have a great deal of discretion, making outcomes in these cases difficult to predict. Each case is decided on its own and precedent has limited value. Several aspects of the admission system create this discretion.

- criteria for character and fitness are even less well defined than Rule 8.4 standards for misconduct
- applicants have the burden of proof
- initial decisions are made privately by committees.
- the standard of review in most states is de novo on the record; however, the courts ordinarily will give the decisions of admissions authorities considerable deference when credibility of a witness or conflicting evidence is the issue. *Lane v. Bar Comm'n of the Neb. State Bar Ass'n (In re Lane*), 249 Neb. 499, 500 (Neb. 1996)
- federal statutory protections such as the ADA are rarely invoked and rarely with success
- constitutional review of admissions standards reinforce discretion by emphasizing that the practice of law is a privilege rather than a right.

5. Closure: Interviewing Skills

(Skills Assignment 3-A, page 69; Outcome 3-c)

If you have used the class time for an interviewing exercise, you can summarize the lessons from that exercise as well. I like to emphasize the connection between good interviewing

skills and the standards of professional responsibility and then summarize the critical errors that attorneys make in interviewing:

- Assuming they know the story
- Interrogating rather than interviewing
- Failing to listen carefully
- Ignoring the client's feelings
- Making the client feel stupid

Chapter Four: The Legal Services Industry

There are two quite different ways you can handle this chapter. One is to emphasize rule reading skills and keep the focus of the class on Rule 5.5 primarily as an exercise in that skill. The other is to focus the class on the future of the legal profession. If you have enough time, you can take two classes to address both topics nicely. Otherwise, there are choices to be made.

Outcomes, Assessments, and Assignments

Outcome 4-a: Reading and Analyzing Lawyer Regulation

In analyzing the applicability of Rule 5.5 to a set of facts involving an attorney's practice, students should be able to analyze how likely it is that the facts would constitute the unauthorized practice of law and how, short of becoming licensed, the attorney involved could increase the chances it would not be unauthorized practice.

Reading Assignments:

Chapter 4.

You may wish to specifically assign some of the exercises or problems in this chapter for students to prepare for class. You may wish to have students write out an answer or simply prepare to discuss. For example, I direct the students as follows:

Be prepared to discuss the following problem(s) in class:

- Preliminary Problem: The New World of Legal Practice
- Questions on Rule 5.5 (end of section 4.3—pages 79-80)
- Examples of Practice Developments from North Carolina (end of section 4.4)

Assessment:

The "Test Your Understanding" problem at the end of the chapter can be used effectively to assess student mastery of the rules. I suggest to students that they can use the problem as an example of an exam question and provide the students the following rubric to self-assess their analysis.

Rubric for Suem Quiz

1) What law determines whether Suem's actions are the unauthorized practice of law for the purposes of discipline?

- Did the answer keep clear the difference between 8.5(a) jurisdiction to impose discipline (both MoKan and Iowaska) and 8.5(b)choice of laws?
- Did the answer recognize that because this action involves litigation, the "tribunal" part of 8.5(b) test would be the more likely standard than the "predominant effect" test?
- Did the answer recognize that the practice was in federal court but that Iowaska law would apply because the federal court's choice of law rules defer to the disciplinary rules of the state in which the court sits?

2) What is Suem's best argument that he is not engaged in the practice of law?

- Did the answer argue that Suem was not practicing law, as opposed to arguments that he was not engaging in unauthorized practice?
- Did the answer characterize Suem's practice as not applying law to "individualized needs" of client cases or as more in the nature of an expert witness or a management consultant?

3) What is the best argument that Suem is engaged in the practice of law?

- Did the answer focus on why Suem was practicing law, as opposed to why it was unauthorized practice?
- Did the answer argue that Suem was exercising legal judgment, providing legal advice and being paid on a contingent fee basis—all clear signs of an attorney's practice and falling under the Iowaskan definition of "analysis, advice or other legal assistance"

4) If Suem's actions are considered the practice of law, what is his best argument that these activities are not unauthorized practice?

- Did the answer argue that he allied a combination of the temporary nature of the practice (one case), the federal law exception of Rule 5.5, and the local counsel rule?

5) What are the risks to Suem for agreeing to this arrangement?

- Did the answer recognize that Suem could be disciplined in any state in which he is licensed?
- Did the answer recognize that Suem could be subject to criminal liability under the Iowaskan statute?
- Did the answer recognize that Suem could be enjoined from practing in Iowaskan, could be civilly liable for fees and costs should his participating require disqualification of the firm, and could result in the forfeiture of fees (citing Creasy)?

6) How would you advise Suem to reduce these risks?

- Did the answer recognize that the best route to avoiding unauthorized practice would be to be admitted pro hac vice and that other risks could be reduced through clear notice to the clients and by billing for services rather than using a contingent fee?

Outcome 4-b: Reading and Analyzing Lawyer Regulation

Students should be able to identify situations in which attorneys are at risk of discipline for permitting lay person involvement with the lawyer's delivery of legal services.

Assignment:

Section 4.4 of Chapter 4.

Assessment:

While one could focus on the details of the rules regarding multidisciplinary practice, I prefer to simply expose students to the broad issues. Again, some simple hypotheticals can assess student ability to recognize these issues.

Outcome 4-c: Practice Management

Students should be able to describe key trends in multijurisdictional and multidisciplinary delivery of legal services.

Helping students to appreciate the extent to which the current rules are under tremendous pressure is a difficult outcome because change is frightening and students often perceive discussions of the future as have the same irrelevance as they sometimes perceive history.

Research Assignment:

I give students the following directions:

Watch this YouTube video by Richard Susskind on how technology will change the legal market: http://cyber.law.harvard.edu/interactive/events/2009/04/suss kind. Identify one current example of a law firm, company, or product that reflects the trends he is talking about in the video. Does this activity violate the rules of professional conduct?

Assessment:

Assessments of this outcome can be achieved through demonstration of student awareness of practices on the edge.

Suggested Classroom Learning Activities

1. Set Up: Changing Nature of Law Practice

(Section 4.1; Outcome 4-c)

A historical perspective can help student understanding of the materials in this chapter. An easy place to begin is with the multi-jurisdictional practice of law. You can begin by asking students why jurisdictional restrictions on law practice were not even an issue until the 1960s and why it was not until 2002 that the ABA adopted some standards for when an attorney was practicing law in another jurisdiction.

Students will easily identify the increasing size and mobility of law firms and businesses as one reason that UPL is more of an issue today. They are less likely to identify the increasingly uniform nature (whether federal or because of convergence of state law) of law as making multijurisdictional practice easier. Nor will they appreciate the degree to which the "practice of law" has expanded from a largely trial advocacy practice to an increasingly complex planning and transactional practice. As the ABA Commission report cited in the text notes: "Often, the most significant qualification to render assistance in a legal matter is not knowledge of any given state's law, but knowledge of federal or international law or familiarity with a particular type of business or personal transaction or legal proceeding."

2. Set Up: Rule 5.5 and the Territorial Nature of Law Practice

(Section 4.3; Outcome 4-a)

Particularly if you intend on spending the majority of class time on Rule 5.5, a good warm up for this class is to ask students to distinguish "systematic and continuous presence" and temporary practice. I ask students if they recall similar standards from their study in civil procedure. Students will readily see the analogous standards from personal jurisdiction law. Help the students see that both personal jurisdiction law and unauthorized practice of law are territorial standards that are under pressure from technology and mobility of modern business and law practice.

Ask students to respond to the questions after Rule 4.3 (Reading the Rules) and relate each of the questions to the part of Rule 5.5 that makes the activity more or less risky. This is an excellent exercise for students to complete in pairs or groups.

Some of the examples fall more clearly under the safe harbor provisions of Rule 5.5(c).

Rule 5.5	Relevant Problem
(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:	
(c)(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter.	h (expert consultation with local lawyer)
(c)(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;	f (court practice while awaiting pro hac vice),
(c)(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or	I (local client, foreign arbitration)
(c)(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.	a (home client, foreign law) b (your law, foreign client)
(d) A registered lawyer in good standing (d)(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or	f (in-house counsel)
(d)(2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.	d (regular federal practice in foreign jurisdiction)
(b)(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law: or	
(b)(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.	

The problems that students are most likely to differ in their interpretation are problem C (part-time residence and practice in foreign jurisdiction) and problem E (100 hours a year for three years practice in foreign jurisdiction). Students should be pushed to explain how each of these is both "temporary" and "arising out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice."

3. Discussion of In Re Trester

(Section 4.3; Outcome 4-a)

Q. What are the consequences of practicing law in a jurisdiction in which you are not authorized?

A. The attorneys in *Birbower* were required to forfeit their substantial attorney's fees

The attorney in *Trester* was disciplined, subject to civil and criminal liability (be sure to tease out the various causes of action).

The Arizona rule provides another example of consequences: restrictions on advertising, which can create additional grounds for discipline.

Other consequences can include cease and desist orders and disqualification motions.

Q. What is the "practice of law"?

A. For purposes of this chapter, students need only recognize two answers to this question. First, students must accept that there is no clear answer to this question. For purposes of this chapter, you can simply rely on the old adage "*The practice of law is what lawyers do."* Second, students must recognize that, in this state of indeterminacy of the law, doubts will be resolved against attorneys who are doing anything that looks like practicing law outside their jurisdiction. Thus, students should operate on the principle that, if it looks like legal services, it's probably practicing law. We will revisit the question of the definition of the practice of law in Chapter 25.

Q. What if Trester had been advising the Bag Company about Kansas law? Would that have been permissible? What if Trester had been in Kansas, advising a Kansas company about California law? Would that have been permissible?

A. It is helpful for students to recognize that Rule 5.5's limit on practicing law is a territorial restriction rather than a restriction on the type of law an attorney can use and advise clients about. There are plenty of other reasons not to give clients advice about the law of a foreign jurisdiction (including most importantly competence) but unauthorized practice of law (UPL) is not one of those. I try to emphasize to students that UPL prohibits attorneys from practicing IN another jurisdiction where they are not licensed but doesn't prohibit them from the practicing the law OF that jurisdiction.

Q. How does Kansas law regarding unauthorized practice compare to the Arizona rule (and the ABA Model Rule)?

A. A second feature of the law to emphasize is the variation of state willingness to provide safe harbors for out-of-state attorneys. Not all states have adopted 5.5, so it is helpful to simply begin with a reminder that what appeared to be the safest of safe-harbors to the attorneys in *Birbower* was not at all safe and that some states are still in the *Birbower* frame of reference. Kansas, where Trester was disciplined, just adopted the new version of Rule 5.5 as of March 1, 2014. Other states (like the Arizona rule) have additional restrictions regarding advertising that do not provide more safe harbor but simply more opportunities for discipline.

Q. What are some situations (from this case or simply from your reading of Rule 5.5) that would establish clear violations of Rule 5.5?

A. Students should be able to provide several clear examples such as:

- Practice before tribunals without pro hac vice admission
- Establish an office
- Establish a "systematic & continuous presence"
- Held oneself out as a lawyer within the state

Q. Rule 5.5, which Kansas has not adopted, provides several "safe harbors." However, even if Kansas had adopted the new version of Rule 5.5, Trester wasn't likely to be able to use it in his defense. Why not?

A. The key to the safe harbors under Rule 5.5 is that services must be <u>temporary</u>. Trester's practice in California was anything but temporary.

Q. Is temporary practice the only requirement to fall under a safe harbor?

A. Students need to recognize that the rules require that practice be temporary PLUS the attorney must have a valid license in one state to practice outside that state. Ask students to list the additional requirements:

- Associate with local attorney who actively participates
- Obtain pro hac vice admission
- Are business/government entity counsel and provide legal services ONLY to the entity and NOT in court
- Provide services that "arise out of or are reasonably related to" your home state's practice, including specifically participating in ADR proceedings

Q. How do you know that services arise out of or are reasonably related to your practice in your home state?

A. Have students generate situations that would make this interpretation more likely to apply, such as:

- Long-standing client
- Client is from the home state
- Client's activities involve multiple jurisdictions

- Lawyer's recognized expertise

Q. Trester was subject to discipline in Kansas because he was licensed in Kansas, but why did Kansas law apply when his misconduct occurred in California? How would the determination of choice of laws be made under Rule 8.5?

Interestingly, the Kansas court did not apply a choice of laws analysis but simply assumed that Kansas law applied. Under Model Rule 8.5 (which Kansas has not adopted) the analysis would be more likely to result in an application of California law (not that this would have altered the outcome, which may be why the court didn't bother with choice of laws analysis).

I do not belabor the 8.5 rule analysis but do warn students that choice of laws analysis is one of those tricky and easy-to-forget steps in analyzing any legal problem that crosses jurisdictions. I then simply summarize 8.5 for them in simple terms.

- You are subject to discipline anywhere you practice regardless of admission there
- If litigation, law of state of tribunal applies
- In all other matters, where conduct occurs or predominant effect of conduct
- In unclear cases, where you reasonably believe the predominant effect will be (!)

Q. Obviously, there are areas of ambiguity in both the rules governing UPL and in Rule 5.5 that will need continued clarifications by the courts. You, however, likely do not want to have to be the attorney involved in the disciplinary case that provides that clarification. So what do you do to reduce risks when you are providing legal services that may or may not constitute the unauthorized practice of law?

A. Students will readily recognize that licensing is the safest route—whether full or limited admission, or pro hac vice admission, but should be cautioned that neither of these is a simple answer—full admission takes time and money and pro hac admission can only be used on an occasional basis. Some students will offer affiliation with a local attorney as a "cure all" and that certainly can reduce risk in limited circumstances, but again students should be cautioned against viewing this problem as one with simple solutions.

Q. *Trester* raised a defense of "good faith"—why didn't this work?

A. Partly because attorneys are each individually responsible for their own interpretation of the rules and cannot rely on informal ethics advice to permit them to violate the rules. It would be far too easy for attorneys to get the answer they wanted from ethics opinions by shaping the questions they asked. Partly because Trester was simply incredible. He may not have lied to his clients about his licensing but he didn't disclose either and the underlying conduct was serious, ongoing dishonesty involving theft.

Q. If you apply for admission by motion or by pro hac vice, can you practice in anticipation of your admission?

A. It is very important if you teach in an area in which students customarily practice in more than one state that you know the answer to this question for your state. So, for example, in my state, while Missouri Rule 4-5.5 appears to provide a safe harbor for the attorney awaiting pro hac vice admission, a Missouri ethics opinion indicates that an attorney awaiting admission by motion, but not practice as a visiting attorney under the pro hac vice rules. *Mo. Inf. Ethics Opinion 20010014 (2001).*

Q. At one point, Trester claimed that he had an exclusively Federal Practice. As you have read, this is a very controversial area. Why do you think states are uncomfortable with this exception?

A. The exception could, as in Trester's case if he were truly practicing only federal law (if that's possible), permit attorneys to open offices in a state, maintain extensive practice, and be immune from the state's regulation. On the other hand, federal law determines whether attorneys may practice before federal courts and agencies, and for state courts to try to restrict that would create a federal-state Supremacy clause battle the states would like prefer to avoid.

4. Testing Understanding of Rule 5.5

(Section 4.3; Outcome 4-a)

The following are some short questions that might be helpful as assessments, whether in class or as an out-of-class review assignment, though you may want to modify them to reflect your state's geography and practice.

Q. Angelina is an attorney in New York. She is representing Brad (a New Jersey resident) against Jennifer (a Massachusetts resident) in a contract dispute in a nonbinding mediation that will proceed to litigation in Massachusetts if it does not settle. The case is in a state that has adopted 5.5. Angelina has applied to be admitted pro hac vice but is waiting for the motion to be granted, which is a mere formality in that jurisdiction. Can she go to that state to do witness interviews and prepare for the case while she is waiting for the motion to be decided?

A. This easily falls under 5.5(c)(2) "or reasonably expects to be so authorized."

Q. Mike Missouri is admitted in Missouri and in the Western District of Missouri federal court but not in Kansas. He lives in Overland Park, Kansas, a suburb of Kansas City, Missouri. Missouri has adopted the new version of Rule 5.5 but Kansas has not, retaining the older version of 5.5 that merely prohibits practicing law in a jurisdiction in which one is not licensed. Can Mike answer legal questions from his homeowners association when he gets asked during the monthly HOA meetings?

A. Probably shouldn't, especially if "answering legal questions" is considered the practice of law. Kansas provides no safe harbors, and even under the new 5.5, this might be "other systematic and continuous" presence. This is one for which research would be important, in the unlikely event there is caselaw addressing the issue.

Q. Can Clarice Cincinnati, who is admitted in the state and federal court in Ohio and a solo practitioner with a general practice, give advice to Irwin and Kathy, owners of businesses in Indiana and Kentucky across the state line from Cincinnati, about federal immigration law issues that affect the businesses in both states?

A. Probably, assuming adoption of the new version of Rule 5.5 and 8.5 by these states. Under 8.5 the applicable law could be any one of these states—either under primary effect test or the location of the attorney's conduct test. This would arguably fall under the "federal law" exception of 5.5(d)(2), though that is a controversial exception.

Q. Clarice Cincinnati's best friend Ginny Georgia is also an attorney, licensed in Georgia. Can Clarice use Ginny to do a legal memo for her regarding Ohio law on a topic in which on she is a nationally-recognized expert?

A. Again, there is a question as to whether this is the practice of law, since it isn't clear from the question whether Ginny would actually be representing a client, nor is it clear that Ginny is even practicing law in Ohio, since she would be working from her Georgia office. However, even if it was the practice of law in Ohio, it would be temporary practice while associated with local counsel and would easily fall under 5.5(c)(1).

Q. Felix Florida retired in sunny Palm Beach but was only licensed in New York and was too lazy to take the bar in Florida (which doesn't have reciprocity with any state). He decided to place an ad in the local newspaper offering to advise on estate planning on NY law only. Would this be a problem? What if he said that he would only deal with federal administrative matters?

A. Almost certainly. He would be "establishing an office or other systematic and continuous presence in this jurisdiction for the practice of law" 5.5(a)(1) and the disclaimer that he will advise on NY law only doesn't counter the impression that his advertising would create that he is licensed in Florida, thus violating 5.5(a)(2) as well.

5. Discussion of Rule 5.4-5.7

(Section 4.4; Outcomes 4-a and 4-c)

Asking students to more closely examine the examples in the text from the North Carolina Bar Association and discuss the risks and benefits for clients and the public of these practices and the changes in the rules that would be necessary for these practices to be acceptable is one way to assess student understanding. Another method would be to ask students to bring examples of new forms of legal practice to class and present the issues they see in these arrangements (the web is full of examples for savvy students to find).

6. Discussion of Introductory Problem

(Chapter Review; Outcomes 4-a and 4-b)

The introductory problem makes a good wrap up review of the materials in the chapter. You could build an entire class around the problem or simply use it as a brief "issue spotting" review.

Begin by asking students to analyze the risk of violating Rule 5.5 and what additional facts they think would be relevant. Students should be able to discuss the application of Rule 5.5 to this problem with some degree of sophistication. They should recognize that a law firm could conceivably set up businesses from around the world and still only practice law in a particular state (Delaware, for example). However, they should want to know many more facts about the business. If that practice would require travel outside the state for extensive meetings, negotiations, or, especially, appearance before tribunals, the attorneys would be more likely to face UPL challenges. The fact that the firm is an expert boutique would help reduce this risk, especially if the firm had local counsel available. Since much energy and environmental regulation is federal practice that might also provide some safe harbor, depending on the state and the nature of the practice.

Ask students if there is a problem with the attorneys providing non-legal services. Students should be aware that some non-legal services may require their own licensing or be subject to separate regulation that attorneys would need to know and respect.

Focus on lobbying for the question of whether this is the practice of law. You can refer to the D.C. rules in the text to help students understand why D.C. is more likely to have developed its rules.

Finally, ask students how they might incorporate allied professionals (accountants, engineers, patent agents, etc.) into the firm as full-time employees? Have students identify the limitations (no equity ownership, subject to rules of professional conduct, conflicts in professional obligations) that the rules provide. Finally, ask students whether they think these are wise policy?

7. Closure: Minute Paper

(Chapter Review; Outcomes 4-c)

Ask students to take one minute and write down the greatest risk of discipline they believe they will face under Rules 5.4-5.7 in their future practice and how they will reduce that risk. Have students put their name on their papers and turn them in. This will not only reinforce the changing nature of these rules, but require the students to make the rules their own in a very

personal way. Review the minute papers after class, and return them to the students with a cover page (or oral report if you return the papers in class) summarizing common themes and correcting common misunderstandings. Any individual minute papers that have unusual or significant misunderstandings can include an additional explanation or a "see me" note.

Unit One Review & Transition to Unit Two

If you have not spent much time in these chapters on broader questions of policy, trends, and personal identity, some time spent at the end of this unit to engage students in reflection and discussion of these questions can help put the unit in perspective. Guest speakers from the disciplinary authority or bar may be useful in this discussion.

If you have spent more time on the larger policy questions of professionalism and given the rules shorter time in these chapters, taking one class to force students to march through the rules covered by these chapters can reinforce your expectations that students achieve competence in reading and interpreting the black-letter law in the course.

Review Problem

I assign the following problem as a review. Students are instructed to answer the question by using only the materials in the textbook and the rules. I specifically instruct students to be prepared to draw from the entirety of the rules of professional conduct (thus forcing the students to review the entirety of the rules in broad stroke) and to consider any possible violations of other laws and suggest necessary research into those laws. In this way, the review problem reinforces the rule reading and research skills outcomes.

In Re Arnold Attorney

Arnold Attorney and his wife Marguerite own a chain of organic health product stores: Organic Health Products (OHP). OHP is incorporated in Missouri and has its headquarters in Kansas City Missouri, with additional stores throughout Missouri and Kansas. Arnold acts as the attorney for OHP. Arnold is licensed to practice in Kansas and maintains a small business litigation practice in Kansas City, Kansas.

Arnold has a limited license to practice in Missouri, where he registered as in house counsel under Missouri rule 8-105 *Limited Admission for In-House Counsel*, which in relevant part reads:

(a) A lawyer admitted to the practice of law in another state or territory of the United States or the District of Columbia may receive a limited license to practice law in this state if the lawyer:

(1) Is employed in Missouri as a lawyer exclusively for: a corporation, its subsidiaries or affiliates; an association; a business; or a governmental entity and the employer's lawful business consists of activities other than the practice of law or the provision of legal services;…

… (c) The license issued pursuant to this Rule 8.105 only authorizes the lawyer to practice exclusively for an employer meeting the requirement of Rule 8.105(a)(1) and

to engage in pro bono work with an organization approved for this purpose by The Missouri Bar. In all other respects, the lawyer receiving a license pursuant to this Rule 8.105 shall be deemed a lawyer licensed to practice law in this state.

Juliana Silva is a Brazilian citizen who worked at OHP. After working at OHP for three years, Juliana left OHP. Arnold sued Juliana in state court in Missouri, alleging breach of contract and unfair competition.

Juliana filed an answer and counterclaim, asserting that "OHP has engaged in the practice of hiring Brazilians, promising them ownership in products the employee developed using traditional Brazilian medicinal recipes, and then, after learning the employee's recipes, claiming an exclusive ownership interest in the products and processes." Juliana claimed that OHP threatened that if she complained, she would be fired and this would threaten her ability to retain her work visa.

In October 2011, OHP's complaint was dismissed with prejudice on summary judgment.

Juliana's claims proceeded.

During the course of the pre-trial discovery process, Ms. Silva requested the production of several basic sets of documents: such as lists of employees and time and wage records for each. Arnold objected to every request, claiming that the request was "irrelevant, unduly burdensome, and submitted solely to harass." When Judge Smith, before whom the case was set at that time, ordered that Arnold withdraw the boilerplate objections and supply the documents, Arnold claimed that OHP did not maintain time records for employees as they were not paid on that basis and repeated the boilerplate objections to other requests for production. In a later deposition, Marguerite admitted that these records did exist and that she had turned them over to her husband. Arnold continued to exist that no such records existed. Margistrate Smith imposed discovery sanctions on Arnold and Marguerite, finding that he and his wife had "falsely certified responses to requests for production" and that the conduct was "intentional, aimed at preventing Ms. Silva from having information necessary to litigate her claims."

Later, the case was transferred to Judge Jones for reasons entirely unrelated to the case. When key evidence continued to be withheld, Ms. Silva filed a motion requesting default judgment as a discovery sanction. As Judge Jones was considering this motion for default, he received two letters from Arnold. The first was typed with a handwritten message on the bottom of the last page: "Who are you going to trust &

believe—an illegal alien or a U.S. citizen?" The second letter was an email sent directly to the judge.

The email read:

Dear Judge Jones:
Illegal aliens like Silva are bankrupting America. She is going to school here in the U.S. but refuses to become a citizen. She needs to go back to Brazil. I am asking the Court to freeze all of her assets pending the outcome of this case.
Arnold Attorney

At the hearing on the motion, Judge Jones asked Ms. Silva's attorney if it was basing its motion in part on the letters Arnold had sent to the court. Ms. Silva's attorney, after some confusion, realized that he had never seen these letters. He asked the court clerk for copies, which took some time to locate because they had never been formally filed. When he showed the letters to Ms. Silva, she was so shaken she began crying.

Judge Jones then ruled on the motion. Rather than granting default judgment, an alternative sanction, Judge Jones instructed the jury regarding adverse inferences they could draw based on Arnold's destruction of time records, finding that Arnold's intentional spoliation of evidence subject to discovery was "abundantly clear."

The jury returned a verdict in favor of Juliana, awarding her over $500,000, on her claims of alienage discrimination and theft of trade secrets. The judge also filed a disciplinary complaint with the Missouri office of disciplinary counsel.

Advise disciplinary counsel, analyze whether there is a basis for bringing a disciplinary action against Arnold under Rule 4-8.4 of the Missouri Rules of Professional Conduct. Identify each separate basis for discipline and explain why Arnold's conduct would constitute misconduct under that provision. Recommend the sanction you believe would be appropriate for this conduct and explain.

Instructions:

Your answer should include citations to applicable authority found in either the textbook or the rules of professional conduct. To the extent Rule 8.4(a) misconduct is implicated, you will need to scan the entire set of rules of conduct to determine those that might have been violated. For violations of other laws, you should indicate the research you would conduct, but you should not feel that you must actually undertake that research.

Please confine your answer to no more than 1500 words. Please do not feel compelled to produce anywhere close to 1500 words if you have analyzed the problem to your satisfaction.

Answers will be graded on:

- Effective interpretation of relevant rules
- Concise and thorough application of those rules and their underlying policies to the facts presented
- Clear communication of this interpretation and analysis

Grading Guidelines

- Did the student identify and analyze the issue of Jurisdiction for discipline?
- Did the student identify and analyze the issue of Choice of Laws?
- Did the student identify and analyze the issue of Dishonest Business conduct as a basis for discipline?
- Did the student identify and analyze the issue of Misconduct in Litigation as a basis for discipline?
- Did the student identify and analyze the issue of Destruction of Evidence as a basis for discipline?
- Did the student identify and analyze the issue of Bigotry as a basis for discipline?
- Did the student identify and analyze the issue of Ex parte contact as a basis for discipline?
- Did the student identify and analyze the issue of possible UPL as a basis for discipline?
- Did the student identify and analyze the issue of appropriate sanctions?

Sample Answer

This is an actual student answer which I provide to students as a sample good, but not perfect, answer.

There are several actions by Arnold Attorney which, if true, rise to the level of providing a basis for disciplinary action under Rule 4-8.4 of the Missouri Rules of Professional Conduct. As a preliminary matter, we should consider that Arnold would indeed be subject to the disciplinary authority of Missouri. Even though Arnold has a limited practice license under Statute 8.105, Arnold is "deemed a lawyer licensed to practice law in this state" for all other purposes, which would include discipline. He would also be subject to discipline in Kansas because he is licensed there as well (Rule 8.5(a)), though Kansas might apply Missouri rules of professional conduct because that is where the activity occurred. (Rule 8.5(b)).

Arnold appears to have the authority to practice and represent the company in Missouri as he holds a limited practice and appears to be practicing exclusively in Missouri for OHP (assuming that the the provision of the limited license statute requiring that the attorney practice "exclusively" for one client, means "exclusively within the state" rather than "exclusively, regardless of location.")

A jury found that Arnold, along with his wife, manipulated and defrauded Juliana and other Brazilian immigrants out of traditional Brazilian medicinal recipes in order to keep the profits from the sales of these traditional medicines for themselves. Additionally, Arnold threatened retaliation against Juliana if she complained about the swindling. These actions violate multiple sections of Rule 4-8.4. The fact that the conduct was arguably in Arnold's capacity as a business owner, rather than attorney, is irrelevant because even private conduct can provide a basis for misconduct. (See Preamble para. 5).

At a minimum, Arnold's actions toward his employees likely violate 8.4(c) as conduct amounting to "dishonesty, fraud, deceit, or misrepresentation" to Juliana and other Brazilian immigrants regarding their participation in the profits of selling their medicines. These same actions reflect on Arnold's "honesty" and "trustworthiness" under Rule 8.4(b) but there is some uncertainty whether these acts rose to the level of criminal conduct as required to constitute misconduct under that section. More research regarding the criminal definitions of these types of acts may be warranted. If the conduct could be considered criminal, it may provide a basis for discipline under this provision even if no criminal charges are filed, since 8.4(b) defines misconduct as a "criminal act."

Also, by threatening to retaliate against Juliana and her coworkers by interfering with their work visas and their legal presence in the US, Arnold violated (d). As the preamble (paragraph. 5) emphasizes, "A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others." Threatened retaliation by using the immigration laws to coerce employees is central to the definition of "conduct prejudicial to the administration of justice."

Second, Arnold's conduct in discovery provided the basis for multiple findings of misconduct. Two different judges sanctioned Arnold for his behavior. Judge Smith found that Arnold and his wife had intentionally lied about time records and imposed discovery sanctions. Likewise, Judge Jones' found that Arnold's intentional spoliation of evidence subject to discovery was "abundantly clear." Spoliation (destruction or unlawful withholding) of evidence is serious misconduct. While we would need to research to determine the extent to which this finding would be the basis for issue preclusion in a discipline proceeding, it is absolutely evidence of a violation of the Rules. Specifically, Arnold's conduct violates multiple sections of Rule 3.4 Fairness To Opposing Party And Counsel. Arnold's spoliation of evidence would demonstrate that he had "unlawfully alter[ed], destroy[ed] or conceal[ed]" evidence or counseled or assisted others to do so. Rule 3.4(a). Equally, his conduct during discovery provided evidence

that he had violated section (c) (knowingly disobeying a court rule) and (d) (failing to make reasonably diligent effort to comply with a legally proper discovery request).

These violations of Rule 3.4 would provide a basis for misconduct under Rule 8.4(a) both through his own violation and by "knowingly assisting or inducing" his wife to do so. All his pre-trial behavior could be characterized as conduct that violates sections (c) in that it is dishonest and (d) in that it is conduct that slows down, interferes with, and impedes the administration of justice. To the extent any of Arnold's statement were made under oath or were destruction of evidence of criminal activity, they might even rise to the level of being criminal acts (perjury; obstruction of justice) in violation of 8.4(b); however, we would need to conduct additional research to determine the reach of those criminal statutes.

Third, Arnold sent letters that were inappropriate in both process and content. In terms of process, Arnold sent not one, but two letters to Judge Jones without letting his opposing counsel know. These letters were ex parte contact with the judge—very likely a violation of the court's rule and thus a violation of Rule 3.5(b), constituting misconduct under Rule 8.4(a). In terms of content, he was also obviously trying to convince the judge to make a ruling based on national origin prejudice.

Finally, in many of the actions previously mentioned—his conduct toward his employees and, in particular, his letters to the judge disparaging Julianna's character based on her nationality, Arnold violated Rule 8.4(g) in that he manifested through words bias or prejudice against Juliana on the basis of her national origin. When he threatened Ms. Silva with interfering with her work visa, it could be interpreted that he was manifesting a bias or prejudice based upon national origin in representing OHP. The statement provided by Miss Silva might not be enough on its own, but when that statement is taken into account along with the statements made in the letters to the judge, there appears to be a pattern with Arnold, showing that he has a prejudice against Brazilians. Comment [4] of the Missouri Rules discusses what constitutes professional misconduct under 4-8.4(g), and one of the requirements is that there be a pattern of the conduct in question, as well as the gravity of the acts. Threatening employees with their livelihood, as well as attempting to influence a judge to freeze her assets establish a pattern of conduct that is a grave offense against human dignity as well as the judicial process.

In terms of sanction, "The discipline to be imposed depends upon the facts of each case and the seriousness of the offenses involved, considered in light of any aggravating and mitigating circumstances." *In re Riehlmann*. The Preamble to the rules (para. 19) reminds us that, in considering sanctions, factors include "the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations."

Where Mr. Riehlman had only failed to report another attorney's misconduct, and appeared to be motivated by concern for his friend, Riehlman was subject only to a public reprimand. In re Riehlmann. In comparison, Arnold's conduct has not been one incident and one

judge found that he was motivated simply by gaining a personal advantage in his conduct. Moreover, unlike Mr. Whitworth, whose misconduct could be attributed in part to his substance abuse and whose attitude in taking personal responsibility for his actions permitted his reinstatement, *In the Matter of the Reinstatement of Whitworth*, Arnold appears not to have any excuse other than greed and shows no evidence of remorse or any interest in taking personal responsibility for his actions. On this basis, it would be appropriate that, at a minimum, Arnold's limited admission as in-house counsel should be suspended for a substantial period of time.

Review Lecture

At a minimum, for review of this unit, I ask students if they have any questions about the materials covered in the unit and address any concerns they have. Often students will want to know how they will be tested over the materials in this unit. Reviewing with the students the priority you have placed on various outcomes in the chapters will help them to focus their study. I also provide a mini-lecture to transition from Unit One into Unit Two. Something along these lines:

In Unit One we saw that the profession of law is highly regulated and is under tremendous pressure. The diversity of business models for delivering legal services is pressuring some fundamental notions we have taken for granted for a long time. Notions like:

- Why should the regulation of the practice of law be the inherent if not exclusive province of the courts?
- Why should states be the locus of control for entry into the legal profession?
- Why should the delivery of legal services be restricted to attorneys?
- Why shouldn't other professionals be able to practice with lawyers as equals?
- Why should the practice of law be "what lawyers do"?

These are questions that are being asked with some very unsatisfactory answers. At the same time that we see pressures to open up the profession to alternative business models, we see attempts to regulate the traditional attorney-client relationship to change the nature of that relationship. For example, as we saw in *Milavetz*, the bankruptcy code targeted the advice attorneys (and other bankruptcy professionals) give to clients. Because of the narrowing construction the Supreme Court gave the statute, the Court concluded that the statute did not interfere with the attorney's ethical duties to a client, but one can easily suspect that at least some legislators might have preferred a broader construction that would have required attorneys to affirmatively discourage their clients from taking on additional debt, regardless of whether that was within their legal rights to do so. So we can see from this example and others that this regulation of the "delivery of legal services" sometimes strikes at the core of the attorney-client relationship, threatening to change it in fundamental ways.

In Unit Two, we will be looking more carefully at what that core is—what makes the attorney client relationship different from other business relationships? How do we protect that relationship? Think carefully about each of the rules we will be studying and ask "whose interests are being protected?" The client's interests in not being taken advantage of by attorneys? The attorney's interests in not being taken advantage of by clients? The interests of both the attorney and client in preserving their relationship against intrusion by others? The interests of the courts or the public in not having attorneys and clients together taking advantage of those very protections?

Chapter Five: Selecting and Rejecting Clients

The materials in this chapter are challenging and very important. I have many times found that the chapter takes two full class periods to truly address all the learning outcomes I consider important. On the one hand, I find that Rule 1.16 is one of the most difficult of the rules of professional conduct for students to read carefully and organize. Thus, I require students to complete the CALI lesson on the subject, spend a good deal of class time simply drilling the rule itself, and do some form of assessment that allows me to gauge student mastery.

At the same time, client formation is such a fundamental issue in practice that I cannot be satisfied with simply drilling students on the rules but want them to have practiced some management and communication skills so they can recognize and reduce risks. I use the "Duty-B-Gone" commercial in class (described below and also included as part of my CALI lesson "Client or Not?") and this has been one of the things students remember long after the course is over.

Finally, students do need to consider their own personal stance toward the types of clients they want to represent. Students need to recognize that the choice to represent (or not) a particular client is one of the most important ethical choices they will make in their day-to-day practice. We introduced that theme obliquely in Chapter One and will revisit this issue in subsequent chapters but this is a good place to reinforce the theme.

When I do take two classes for this chapter, I am able to incorporate some of the material from Chapter 24.1 (The Need for Legal Services) and 24.3 (Reading the Rules: Pro Bono and Appointed Representation), emphasizing the importance of this aspect of client selection.

Outcomes, Assessments, and Assignments

Outcome 5-a: Reading and Analyzing Lawyer Regulation

Students should be able to apply the rules of the attorney-client relationship to identify the three ways in which an attorney-client relationship is formed; explain why it is easier to reject a client than to withdraw from representation; and, in various fact situations, apply the requirements for three categories of attorney withdrawal (mandatory, good cause permissive, and other permissive) and the limitations on withdrawal rights.

Reading and Worksheet Assignment:

Section 5.2 (pages 99-103).
Rule 1.16 and comments in the Rules of Professional Conduct.

Because Rule 1.16 often poses difficulty for student reading and application, I emphasize again in assigning this chapter that students focus on mastering this rule.

In particular, I find that there are two permissive withdrawal situations that cause students the most difficulty, so I assign the following worksheet for the students to prepare for class. In some semesters, I have saved these two worksheets to use in chapters on fees and on client fraud, as they make for good review and reinforcement at that time.

Firing a Client Review Questions

Client Nonpayment: In situations in which clients don't pay their fees, you may want to withdraw before you incur any further losses. How do you go about doing that?

1. Which rule permits withdrawal when a client won't pay?
2. How do you withdraw when your client won't pay? Can you just simply quit working for them?
3. Can you say "I won't work until you pay?"
4. Might a court refuse to permit your withdrawal even if the client hasn't paid?
5. Can you put a clause in your agreement that the client consents to your withdrawal if he or she falls behind in payment of fees?

Client Crime Or Fraud: In situations of client fraud, when is your withdrawal mandatory and when is withdrawal permissive? Go through the following examples. Assume in each that withdrawal would work a material adverse effect on the client. Decide whether you must, may, or may not withdraw.

1. You are defending a client charged with criminal fraud; you believe that the client probably did engage in the fraud
2. You represent a plaintiff in a civil action and there is a counterclaim filed alleging fraud. Given the client's description of her statements and actions, you believe that the client did engage in fraud and will probably lose on the claim
3. You know that your client is or has engaged in fraud in the past that has nothing to do with your representation and your continued representation would not assist in that fraud
4. You believe that your client is planning a fraud which will not involve your services
5. You know that your client is planning a fraud using your services
6. You know that your client has used your services to commit a fraud that is now complete
7. You know that your client has used your services to commit a fraud that is continuing

8. You reasonably believe but do not know that your client is engaged in a fraud using your services

Assessment:

Assessment of student understanding here requires plenty of opportunities for students to drill the rules. Reviewing the worksheet is one place to gather data on student understanding. See the discussion in activity #8, Reviewing Rule 1.16, below.

The CALI lesson cited in the chapter can provide another assessment tool. Finally, this is also a rule for which a "summarize the rule" or a flowchart exercise can quickly uncover gaps in student understanding. The answers to this are provided in classroom activity 8 below.

Outcome 5-b: Practice Management 1

Students should be able to manage client formation to reduce the likelihood of unintentionally creating an attorney-client relationship and to identify and reduce the risk of accepting clients whom they should reject.

Reading Assignment:

Section 5.1 of Chapter 5.

Some basic practice management activities take very little time and can reinforce the rules as well as highlight practical and ethical considerations for students. There are several different skills assignments in this chapter. Be sure to let students know which of these you expect them to prepare for class and whether they will be required to turn in any work product from the exercises.

Assignment Skill 5-A asks students to identify situations in which individuals might become confused about whether the attorney represents them. Skill 5-B similarly asks students to brainstorm categories of clients to reject and identify screening protocols. You can ask all the students to simply be prepared to discuss these problems in class or you can provide more specific assignments. For example, I have divided the class and assigned various "problem clients" to groups of students (client who won't pay, client who doesn't have a good case or a workable transaction, client who can be satisfied, client who expects unprofessional behavior) and then asked students to identify three questions they can ask in the initial interview and one action they can take besides interview questions that can identify these clients.

Assessment:

The key outcomes to watch for are the students' skill in devising appropriate methods to screen for problem clients and their understanding of the limits of an attorney's ability to screen out all of these clients.

I think this learning outcome is sufficiently critical that I include a short-answer question on the issue in the final exam.

Outcome 5-c: Communication Skills 

Students should be able to use forms properly to draft letters and agreements that clarify the attorney-client relationship (or the absence of that relationship).

I assess this outcome at the level of student ability to identify problems in a draft, rather than at the level of expecting them to be able to draft these letters themselves. If you have more time or choose to emphasize communication skills in your course, you may wish to teach drafting and provide students an opportunity to draft more complex engagement letters.

Drafting Assignments:

Parts two and three of Assignment Skill 5-A (page 97) focus on drafting. Exercises 2 is especially useful for a brief assessment, since it requires only that students identify two sentences. Exercise 3 requires drafting a non-engagement letter.

Here is one sample assignment for these exercises.

Locate at least two sample client non-engagement letters. You may use research services (such as form books), bar association materials (as described in the text), or examples from attorneys in the community (be sure individual client information is removed). Bring two letters to class and be prepared to discuss what the letters have in comment and how they differ. From the materials in the chapter and the letters you have gathered, identify a list of necessary and optional elements for a good client non-engagement letter.

Assessment:

Skill 5-A, exercises 2 is one you can quickly review for data on student learning of this skill. Most students identify the sentence in which the attorney suggests that he has already advised the client as increasing risk and the clear disclaimer of representation at the end of the letter as reducing risk.

If you assigned Exercise 3, requiring students to draft a non-engagement letter, you will need to provide more individualized feedback. Having students first share their letters with one another for peer editing suggestions can provide a first level of feedback. You can then collect the letters and choose one to two exemplars to review with the class (either in class or in an online communication).

Either of these can be models for portions of the final exam.

Outcome 5-d: Formation of Professional Identity

Students should be able to predict the types of clients or cases that are likely to present you with the greatest personal difficulty in providing ethical and competent representation and develop some strategies for addressing these situations.

Assignment: Reflection

This reflection exercise can look a lot like Skill Exercise 5-B if students are not given clear directions to reflect on their own experience to uncover those types of clients or cases that they in particular would want to avoid or would have difficulty declining. The text provides one prompt for this assignment. Here is another sample prompt:

Think of a circumstance in which you have been asked to do a job or assignment or work with an individual that made you uncomfortable. Did you raise your concerns with anyone? Why or why not? If so, how? How did you manage the task or relationship given your reservations?

Assessment:

See appendix on reflective learning for more guidance on using and assessing student reflection.

Suggested Classroom Learning Activities

1. Set Up: Polling Class for Basic Understandings

(Section 5.1, pages 91-99; Outcome 5-a)

You can begin the discussion of the attorney-client relationship by displaying the basic rules of client formation on the board/screen/handout and then asking some basic questions yes/no or true/false questions about these rules. I use the format for the rule suggested by the fill-in-the-blanks questions in the pre-test to Unit Two question one (page 91):

You represent a client if

1. You and the client have an agreement
2. You have been appointed to represent the client
3. The client reasonably assumes you are representing him or her

But not if

1. If you have clearly declined the representation

or

2. If you have successfully withdrawn or terminated the representation

I then poll the class to address up front some of the most common misunderstandings about this doctrine. (See polling technique in Part One of the manual for more guidance on engaging the entire class in a poll).

Q. True or False: The Rules of Professional Conduct provide the standards for when an attorney-client relationship exists.

A. False. The rules defer to common law. Notice scope para. 17 of Model Rules and RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14 (2000)."

> A relationship of client and lawyer arises when:
>
> (a) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either
>
> > (1) the lawyer manifests to the person consent to do so; or
> >
> > (2) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services; or
>
> (b) a tribunal with power to do so appoints the lawyer to provide the services.

Q. Does an agreement have to be in writing for it to create an attorney client relationship?

A. No. Many attorneys think that if there isn't a writing, there isn't a representation, but unless you make that very, very clear to a potential client and act consistent with that understanding, it's simply not true.

Q. Is payment of a fee necessary?

A. No. Again, some attorneys will say that they don't represent someone until they are paid an advance or retainer, but it's not true unless they make that prerequisite crystal clear to the potential client and act accordingly.

Q. Do you have to accept an appointment for it to create an attorney-client relationship?

A. No, once appointed, you have the duty to the client and must withdraw if you want to be relieved of that duty.

2. Drill: Preliminary Problem Review

(Preliminary Problem page 94, Outcomes 5-a and 5-b)

Q. Is Amanda a client?

A. She isn't a client because there has been no agreement and she can't reasonably assume she is represented.

Q. Suppose the secretary had said, "Sure, the attorney will take care of that matter. She'll call the tenant today." Then you never do call the tenant because the secretary forgets to tell you. Is Amanda a client?

A. The issue is whether the secretary has the authority to bind the attorney. You will need to review (or teach) the principles of agency for your students.

Actual (express or implied) agency. Refer students to Rule 5.3 duty to supervise non-attorneys and ask if that creates an implied agency.

Apparent agency. For this to exist, the attorney would need to have communicated to the client that the secretary has the authority

Reasonable reliance. Compare *De Vaux v. American Home Assurance Co.*, 444 N.E.2d 355 (Mass. 1983) (lawyer's secretary told would-be client to send letter, arranged medical examination, and told client to write opposing party; jury could find real or apparent authority); *Pro-Hand Services Trust v. Monthei*, 49 P.3d 56 (Mont. 2002) (defendant sought to disqualify plaintiff's counsel based on conflicts because defendant had called and spoken to lawyer's secretary, given basic information, and was told to look for an attorney elsewhere).

Students should conclude that the agency issue is one that is likely to be difficult to predict (since it is often so fact sensitive) so the best way to avoid this problem is to train the staff in avoiding these problems.

Q. Is Barbara a client?

A. Who is your client for sure? XYZ Corporation. See Rule 1.13.

Are you Barbara's attorney also? Remember Rule 1.13(g)—depends on what you say to Barbara, what your past practice has been, and other factors relating to the reasonableness of her belief that you represent her.

Q. Suppose all you say is "tell me more." Is this okay?

A. Notice that even the ambiguity is itself a violation of the rules. Rule 1.13(f).

Q. Suppose you say, "Here's what you should do."

A. You've probably have created a relationship.

Q. What if Barbara's interests conflict with the company? Suppose Barbara asks you to keep secret the fact that she has been helping with the overbilling.

A. One common misconception I hear from students is, if an attorney would have a conflict of interest in representing two associated persons (e.g., the company and the employee), he or she couldn't be representing both. The students misread the conflict of interest rules as making it impossible to establish an attorney-client relationship in these circumstances, rather than recognizing only that establishing such a relationship would violate the rules. I tell the students "No, you can enter into a representation that the rules prohibit—you shouldn't but, as a matter of whether or not you represent someone, you can. In these circumstances, you've entered an attorney-client relationship and also a world of trouble. Barbara could reasonably assume you represent her, even if the rules prohibit that representation. You have a duty of confidentiality to one client and a duty to disclose to the other, so that no matter what you do, you are violating a rule.

Q. Is Clarence a client?

A. Who is the client? In every state, the insured is a client, sometimes by virtue of statute, sometimes by common law.

Is the insurer also a client? It depends:

- On the agreement between the attorney and the insurer.
- On the agreement between the insured and the insurer.
- On the agreement between the attorney and the insured.
- On the governing law.

Q. Are both Darryl & Edward clients?

A. Can you represent a witness? Yes, sure. Clients can engage you for limited advice.

Again, remember, just because you shouldn't represent the witness and the defendant, doesn't mean you aren't representing them both.

Ask students, "What can you do to clarify this situation?"

Q. Do you represent both Felicia & her client George?

A. Is Felicia an agent for George or is the Felicia asking you to represent her? What are you if you aren't a lawyer representing SOMEONE?

A common situation in which this arises is when you are asked to "cover" for a friend in a case (for example, run down and ask for a continuance or act as local counsel for purposes of service of process). Sometimes a lawyer will agree to have a limited involvement in a matter in order to accommodate a colleague or even another client. The ABA/BNA manual reports that "courts do not appear to accept the notion of an "accommodation client" to which the lawyer owes fewer or no professional obligations."

For example, in *Streit v. Covington & Crowe*, 98 Cal. Rptr.2d 193 (Cal. App. 2000), Streit sued several lawyers for malpractice, including Covington & Crowe, whose only connection to her case was that it had covered a hearing on a motion for summary judgment "as a professional courtesy" to her attorneys of record. In reversing the trial court's summary judgment

in favor of explained that "by agreeing to 'specially appear' in the place of Streit's attorneys of record, Covington & Crowe undertook a limited association with that firm for the purpose of representing Streit at the hearing on the motion for summary judgment. Covington & Crowe thereby entered into an attorney-client relationship with Streit pursuant to which Covington & Crowe owed Streit a duty of care." The concurring judge noted that "A major drawback of defendant attorneys' proposal for 'limited liability' representation on 'perfunctory' matters, is that we do not know when the 'no-brainer' appearance will suddenly transform into the crucial turning point of the case."

Q. Do you represent the Hospice organization?

A. First question: Are you practicing law? Remember that merely giving legal information as opposed to *advice* is not generally considered practicing law, though the line between the two is a thin one.

Second question: If so, is it reasonable for the board to rely? This ready access to legal advice is often one of the reasons that boards have attorneys, but it is a real risk to the attorney to provide this advice.

3. Identifying Significant Facts

(Section 5.1, pages 91-99; Outcome 5-a and 5-b)

Q. Suppose you have an attorney come to you asking for your representation in a malpractice action. List the facts you would want to have about the attorney's relationship with the individual that would help you predict the likelihood that the court or jury would find an attorney-client relationship?

A. After students generate some facts, you can share the list from RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14(1)(b).

- Previous or current relationship with the attorney
- Nature of the case (emergency v. long-term planning)
- Nature of the client (sophisticated, distressed, experienced)
- Directness of the channel of communication (face-to-face, phone, email, web)
- Previous or current business or personal relationship with the attorney
- Whether attorney or potential client is acting through an agent
- Setting for the conversation (party, public, office)
- Amount of time spent with potential client
- Attorney's motivation in speaking with the client
- Attorney's statement (information v. advice; promises; assessments)
- Form of disclaimers (oral, written, clear or ambiguous, repeated, visible)
- Documentation
- Fees paid

4. Identifying Risks of Ambiguity in Relationships
(Skill 5-1, part one, page 97; Outcome 5-b and 5-d)

Question 5-A part one asks about situations that cause ambiguity. The text explores many situations. Students should be able to generate examples of people who are associated with the client and who may believe that they too are represented by the attorney. Chapter 17 addresses some of these in greater detail and you can preview those here. These might include: human members of an entity that the attorney represents; witnesses an attorney is preparing to testify on behalf of a client; family members of a client (especially if your client is a youngster, elder, or otherwise impaired); or insurers who have hired an attorney to represent an insured. Likewise, students should recognize the second category of situations in which ambiguity can arise as those situations in which people with whom an attorney associates, but in a capacity other than as an attorney (such as board service), assume the attorney is providing them legal advice.

5. How to Clarify and Reduce Your Risk
(Section 5.1, pages 91-99; All outcomes)

Ask students to summarize the three or four best ways to reduce the risks of ambiguity regarding whether someone is your client. Be sure that they address at least these:
DISCLAIM the relationship
GET IT IN WRITING
REMIND everyone regularly whom you do and do not represent
ACT consistently with your representation

These four steps are what I call in my CALI lesson: "Duty-B-Gone", which goes something like this:

> .... *And now a word from our sponsor...*
> "But your honor, I didn't *know* he was my client!!"
> Don't let this happen to you! With DUTY-BE-GONE you can eliminate the risk that you will owe duties to people you don't want to represent. Simply apply DUTY-BE-GONE to your conversations with third parties and potential clients, and you will disclaim an attorney-client relationship. With one press of a button, those pesky parties will understand:
>
> - that they are not your client,
> - that you will not represent their interests,
> - that you will not protect their confidences,
> - that you will not avoid acting in ways contrary to their interests, and
> - that they should seek the advice of an attorney.
>
> For especially risky situations, consider SUPER DUTY-BE-GONE. In addition to the standard disclaimer, SUPER DUTY-BE-GONE:
>
> - secures a written waiver from the potential client or third party,

- has a timed release formula that regularly reminds the third party or potential client of your role, and
- sounds an alarm whenever you act in a manner inconsistent with your disclaimer.

Don't be surprised by unexpected duties! Get DUTY-BE-GONE today!
(Warning: *Do not attempt to use on actual clients. Void where prohibited by law...)*

6. Documentation Issue-Spotting Exercise
(Problem 5-A Part Three, page 97-98; Outcome 5-c)

The text exercises on documenting the relationship are fairly straightforward. The question to ask the students to consider is, "If it is so easy to make disclaim the attorney client relationship without any ambiguity, why don't attorneys do so?" Problem 5-A, exercise 3 is a good device for helping students to understand this question. First, the letter is blunt to the point of rudeness. But more importantly, of the six statements in the letter, the one that students should recognize that they would least want to communicate in many circumstances is "I won't represent you" (as opposed to I haven't and I don't). An attorney may want to decline a client for a number of reasons that wouldn't necessarily preclude the desire to represent that individual in the future or have that individual refer others to the attorney. Too blunt a non-engagement letter discourages this future business.

The last three statements in the problem, explicitly disclaiming competence, confidentiality and conflict-free representation are, of course, overbroad, as Rule 1.18 provides that attorneys owe duties of confidentiality and loyalty even to prospective clients.

7. Screening Out Clients
(Chapter 5, Outcomes 5-a, 5-d)

Q. Why is it easier to reject a client in the first place than to accept and then withdraw?
A. You need not have a reason to reject a client whereas withdrawal is governed by Rule 1.16. Once an individual becomes a client, even if the attorney later withdraws, the attorney owes duties of competence, communication, confidentiality and conflict-free representation. Those duties would not ordinarily have arisen had the attorney initially rejected that representation (with some exceptions we will study later). Some dilemmas (conflicts for example) aren't cured by withdrawal. Moreover, once you have entered an appearance on behalf of a client, you must have the court's permission to withdraw.

Q. Ask students to come up with a list of clients they would not want to represent and identify questions they could ask or other steps they could take to identify these "red flag" clients.
A. Some important examples with solutions my students have identified include:

- Clients who won't pay
  - Credit screening
  - Ask them, "Can you afford this?" "How do you think you will pay for this?"
  - Get an advance on fees
- Dishonest clients
  - Ask them their goals
  - Ask what they expect you will be able to do for them
  - Ask for references
- Clients who sue their attorneys
  - Ask, "Have you ever worked with an attorney before?"
  - Ask, "Have you ever been in a lawsuit before?"

8. Reviewing Rule 1.16

(Section 5.2 pages 99-103; Outcome 5-a)

Q. What is the difference between the withdrawal rule in 1.16(a) and 1.16(b)?

A. Mandatory v. permissive.

Q. Under 1.16(a), one of the reasons that an attorney may be required to withdraw is that the client fires the attorney. A client has a right to discharge a lawyer at any time, with or without cause. If a client fires you, does that mean that you need not and should not do anything else for that client?

A. Get court permission if you have entered an appearance, give reasonable notice to client of your withdrawal, give time to secure other counsel, refund unearned fees, and take any other reasonable steps to reduce prejudice to the client from the withdrawal (e.g., assist in transfer of files, complete time-sensitive steps, secure continuances, etc.). As students will see in Chapter Seven, generally the entire file, including the attorney's work product, must be surrendered, subject to any state laws allowing retaining liens for unpaid work. *See generally, Sage Realty v. Proskauer Rose Goetz, 698* N.E.2d 879 (N.Y. 1997) (all documents must be surrendered absent showing of good cause to deny client access).

Q. How far do the Rule 1.16(d) obligations to assist a client upon withdrawal go? Look at Problem 1 on page 103. Must the attorney give the client the petition or file it on her behalf or be liable for malpractice?

A. No. Malpractice sounds in torts/negligence and the duty would be that of a reasonable competent attorney. The attorney did not breach that duty because a reasonable competent attorney would not assist in ongoing fraud. This is false because it presumes the client has a right to file a frivolous complaint. Rule 11 of the Federal Rules of Civil Procedure (and its state counterparts) and the law of fraud and abuse of process generally make it clear that a client does not have a right to file a lawsuit based on information the client knows is false in order to support

a fraudulent scheme. Second, malpractice requires damages. There is no damage here, because the client did not have a valid claim.

Q. Under 1.16(a) a lawyer may be required to withdraw from employment, even if the client and the lawyer both want to continue the relationship. Can you think of examples of when that might happen?

A. The attorney would be violating a rule by continuing the representation (e.g., the attorney is not admitted to practice law in that jurisdiction or will be a necessary witness in the case) or the court, for some reason, disqualifies the attorney (e.g., for conflict of interest).

Q. Rule 1.16(b) provides for permissive withdrawal. Can you summarize that rule in one sentence?

A. One example of a sentence students might provide: "An attorney may withdraw if it will not cause a material adverse affect on a client, or if the attorney has good cause."

Two circumstances are especially difficult in Rule 1.16(b): withdrawal for nonpayment of fees and withdrawal because of the client's misdeeds. If you have assigned the worksheet in Outcome # 2 above, review the answers with students, or use the questions for dialogue.

CLIENT NONPAYMENT:

1. Indiana Rule 1.16(b)(5) permits withdrawal when a client won't pay ("fails substantially to fulfill an obligation").
2. You cannot simply quit working for a non-paying client. First, you have to give the client "reasonable warning" that you with withdraw if you aren't paid. Rule 1.16(b)(5). Second, if you are required to seek a court's permission to withdraw, you must obtain that permission before withdrawing. Rule 1.16(d).
3. It would violate the rules to say "I won't work until you pay?" because an attorney has an obligation of diligence under Rule 1.3 and nonpayment is not a valid reason for delay.

Q. Might a court refuse to permit your withdrawal even if the client hasn't paid?

A. There are three circumstances students should be able to suggest:

- When withdrawal would cause significant prejudice to the client and that prejudice outweighs the financial harm to you.
- When the attorney could have prevented the situation (e.g., the attorney knew the client would be unlikely to be able to pay but agreed to represent them anyway).
- When it's too late, (attorney waited too long into the process and withdrawal would now impose significant costs on the court as well as the client).

Q. Can you put a clause in your agreement that the client consents to your withdrawal if he or she falls behind in payment of fees?

A While attorneys sometimes put clause such as this, some courts have found these provisions to not only be ineffective as advanced consent to withdrawal (since it would be difficult to find this consent "informed") but to be unethical in that the attorney is attempting to expand the right to withdraw beyond that permitted by Rule 1.16, thus violating Rule 8.4(a) ("attempt to violate").

CLIENT CRIME OR FRAUD:

Q. You are defending a client charged with criminal fraud. You believe that the client probably did engage in the fraud. Must you withdraw? May you withdraw?

A. This question asks students to confront the role of the advocate for a criminal defendant and reminds them that an attorney who defends an individual accused of a crime, even if it is clear to the attorney that the individual did commit the crime, is not vouching for the client's choices. Referring students to Rule 1.2 is helpful at this point. Some students will want to insist that the attorney may withdraw if the client insists on putting on a losing defense, but this raises the special role of criminal defense counsel and allows discussion of the narrow range of 1.16(b)(4), in which the client must insist on action and the lawyer must consider the action repugnant or have a fundamental disagreement to the degree that the attorney cannot competently represent the client. A client who merely wants to do something dumb (has an "imprudent objective") is not reason enough to withdraw unless that withdrawal would not have a material adverse effect on the client. Rule 1.16(b)(1). This is a great opportunity to ask students to reflect on whether they have the right stuff to be a criminal defense attorney.

Q. You represent a plaintiff in a civil action and there is a counterclaim filed alleging fraud. Given the client's description of her statements and actions, you believe that the client did engage in fraud and will probably lose on the claim

A. Similar to the prior problem, the fraud here occurred (or at least the attorney believes it occurred) in the past. First, you must determine whether you had agreed to represent the client on the counterclaim in the first place. If you had not expressly narrowed the scope of your representation to exclude counterclaims, you likely are representing the client and so would need to fulfill 1.16 in order to withdraw. Second, you could not withdraw simply because the defense to the claim isn't strong. Rather, you would need an independent basis for withdrawal. If defending the fraud claim would violate a rule (e.g., frivolous actions) there would be a basis for mandatory withdrawal. Rule 1.16(a). There might be a basis for permissive withdrawal under Rule 1.16(b)(4) if the client insisted on defending the fraud claim and you so fundamentally disagree with that strategy (rather than settlement for example) that your relationship with the client or your competent and diligent representation would be jeopardized. The lesson for the students is to focus on the client's needs rather than the attorney's.

Q. You know that your client is or has engaged in fraud in the past that has nothing to do with your representation and your continued representation would not assist in that fraud

A. This is simply a generalized statement of the prior two problems, reinforcing the distinction between defending a client accused of fraud and assisting a client in fraud. There is little basis for withdrawal simply on the basis that you know that your client is or has engaged in fraud in the past that has nothing to do with your representation and that your continued representation would not assist. Again, sometimes students will argue that withdrawal would be permitted under section (b)(4) repugnance. However, that section also refers only to future, not past, actions. You can refuse to represent a client because you don't like them, but you can't withdraw on this basis.

Q. You believe that your client is planning a fraud which will not involve your services

A. If, however, the question is the client's *future actions*, even if those actions don't involve your services, you may have a basis for permissive withdrawal under 1.16(b)(4). However, there are several steps here. First, you would have to warn the client that you will seek to withdraw if they continue their activity. Notice that the rule requires that the client "insists." That term implies some effort on your part to deter their conduct. See also comment 2 to Rule 1.2 ("The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement.") Second, the nature of your disagreement must be "fundamental" or you must consider the conduct "repugnant." Most courts find that this means your relationship with the client or your competent and diligent representation would be jeopardized.

Q. You know that your client is planning a fraud using your services

A. Even if your client is planning a fraud using your services, the same basic point applies as before: a client's plans alone are not a basis for either mandatory or permissive withdrawal, unless the attorney has tried to dissuade the client from those plans. This point appears in several places in the rules. The language of Rule 1.16(b)(2)("persists") and (b)(4) ("insists") implies an effort to change the client's mind. Comment 2 to Rule 1.16 reinforces this idea. Comment 13 to Rule 1.2 is especially on point, and cites Rule 1.4(a)(5) as an additional source. Of course, if the client cannot be dissuaded, and the attorney knows the client's conduct is fraudulent, the attorney must seek to withdraw if continued representation will result in assisting the client in a crime or fraud. The withdrawal is mandatory even if it will have a material adverse effect on the client's interests. Model Rule 1.16(a)(1). See also Model Rule 1.2(d).

Q. You know that your client has used your services to commit a fraud that is now complete

A. Students are often baffled by Rule 1.16(b)(3), making withdrawal permissive when the client has used the lawyer's services to perpetrate a crime or fraud. What they need to understand is that, ordinarily, if a client has used an attorney's services to perpetrate a fraud, and is continuing to use the attorney's services in any way at all related to that past fraud, there is likely to be some element of continuing fraud in the representation. I suggest to the students that, even

if the past fraud is completed, if the attorney's continued representation would assist in reducing suspicion or discovery of the fraud by giving the appearance of validity to the underlying transaction or otherwise, the attorney must withdraw. I also tell them that, even if my interpretation is too conservative, my own personal code would make 1.16(b)(3)'s permissive withdrawal one that I would always seek to exercise if I could not effectively assist my client in repairing the effects of their fraudulent conduct.

Q. You know that your client has used your services to commit a fraud that is continuing

A. Students should recognize that withdrawal is wise if not nearly always required. This is a good point to foreshadow the confidentiality rules and exceptions. Draw students' attention to Comment 10 to Rule 1.2. This "red flag" withdrawal comment was very controversial at the time it was created, but is less so now that Rule 1.6 provides exceptions to confidentiality permitting disclosure to prevent or rectify fraud causing substantial financial harm that involve the attorney's services.

Q. You reasonably believe but do not know that your client is engaged in a fraud using your services

A. The Rule 1.16(b)(2) state of mind distinction between permissive and mandatory withdrawal is difficult for students to understand. They cannot easily see why an attorney who reasonably believes the client is using his services to engage in fraud wouldn't want to withdraw. This is especially troublesome for students when reminded that the line between "reasonably believes" and "knows" is a fine one, especially given that the definition of "knowledge" in Rule 1.0 provides that knowledge can be inferred from the circumstances. However, explaining that if the lower standard of reasonable belief provided the trigger point at which withdrawal became mandatory, attorneys would be required to withdraw before they would have the opportunity to investigate to discover if their suspicions were correct or before they could make further attempts at dissuading the client from illegal conduct. Especially since these situations are so often much clearer in hindsight, this standard provides the greatest protection to attorneys (which, after all, is one of the primary purposes of the withdrawal rules). If you put them in the position of a corporate counsel who may still be able to alter his or her client's behavior or the attorney who is simply unable to get the whole story, it is easier for them to understand.

9. Closure: Disengagement Letters

(Skills Problems 5-A and 5-B, page 97-98; Outcome 5-c)

The chapter's drafting exercises focus on non-engagement letters, in part because these are easy form-driven letter of great significance, and so are a good place to start in thinking about drafting. If you have assigned these drafting exercises and given them some attention in class, a very good closure activity for students is to think about how a non-engagement letter differs from a disengagement letter following a withdrawal. For example, while an attorney might not

want to explain why they are rejecting a client, they may want to document their reasons for withdrawal. Asking the students to think about the practicalities of how they would withdraw from a client helps to focus their attention beyond the rules to the difficulties of communication.

10. Closure: Minute Paper

Because Rule 1.16 is a challenge for many students, this is a good chapter to end with a "What is the one thing you are still confused about from this chapter?" minute paper.

Chapter Six: Providing Competent Lawyering

This chapter contains a great deal of doctrinal material, material which could take an entire course (indeed, in our law school we have a specialized 2-credit-hour seminar in professional malpractice). I emphasize to students (and continually try to remind myself) that the goal of the chapter is not that they master the law of malpractice/ineffective assistance/relief from judgment/ etc., but that they simply be able to recognize the key role these doctrines play in regulating attorney conduct. I prefer to use class on this topic to get students to begin to think about prevention rather than liability.

Outcomes, Assessments, and Assignments

Outcome 6-a: Reading and Analyzing Lawyer Regulation

> Students should be able to describe the many public and private sources of regulation of attorney competence including the elements of competence, diligence, and communication in the rules of professional conduct; the basic elements of a legal malpractice case; and the applicability and standards of ineffective assistance of counsel.

Reading Assignment:

Chapter 6.

I do not generally include any additional assignments for this outcome other than reading the chapter, but one could use the incomplete outline approach to help students focus on the essentials. See the teaching techniques section in Part One for more information on this tool

Assessment:

Because I do not expect students to master these doctrines at any but an overview level, assessment is simply a matter of determining whether students can recite the key elements and distinguish among them. I rarely test these on the final exam in any depth but only as an issue-spotting level.

Outcome 6-b: Practice Management

> Students should be able to describe how to manage mistakes responsibly and explain what to do when they make a mistake in client representation.

Assignment:

Section 6.1 of Chapter 6 (pages 107-110).

These materials are a good opportunity once again to ask students to bring in examples of attorney misconduct. Ask students to bring in one example of an attorney whose misconduct might be explained by one of the "10 Ways Attorneys Get into Trouble" list on pages 108-09 in the text.

Assessment:

Assessing student competence in mistake management is difficult in a classroom setting. Reflection and dialogue can provide some assessment. I try to use the "10 Ways Attorneys Get into Trouble" list as a simple, non-threatening basis for discussion of mistakes, since nearly everyone can see themselves falling into one of these categories. I use the list throughout the rest of the course. So, for example, for each case in the text after this chapter, I ask students to identify why the attorney got into trouble and refer back to the phrase from this list that best applied. When students begin referring to the list without prompting, I know they have made the concepts their own. Both alumni of the class and the attorneys for whom I have provided the list as CLE lessons have reported they have found this list helpful in practice.

Outcome 6-c: Reading and Analyzing Lawyer Regulation

Students should be able recognize the extent to which they can be held responsible for the mistakes of others and others mistakes can be their responsibility.

Problem Assignment:

Use the list of persons in the law firm on page 122 and identify who would be responsible for the mistakes of others on the list.

Assessment:

Again, this is a purely doctrinal mastery outcome, requiring students to have read and understood Rule 5.1-5.3. The aspect students are least likely to recognize is the managerial responsibility to have policies in place, which can provide liability even for conduct an attorney never knows about.

Rule 5.1(a) attorneys:

Only attorneys A, B, C and D are all designated by the firm as "partners", however, it may be that attorney D, as a non-equity partner, would not be considered a partner with

the breadth of responsibility as the equity partners, since Rule 1.0 defines "partner" as "a shareholder in a law firm organized as a professional corporation." A would still be a partner for purposes of the rule even though he is "semi-retired." Thus all could be held responsible under 5.1 (a) for putting policies in place in the firm to insure compliance with the rules and all could be held responsible under 5.1(c)(2) for conduct they learn of in time to correct it. The main point is that it is not only B, who serves on the management committee, who would be responsible.

Rule 5.1(b) attorneys:

A supervises associates and non-lawyer assistants who work directly with him.

B likely doesn't supervise anyone, unless it would be attorneys and non-lawyer assistants who are working on matters for ABC Corp.

C supervises all attorneys and non-lawyers in the employment litigation department of the firm.

D supervises all attorneys in pro bono cases.

E may supervise younger associates.

F and G likely do not supervise other lawyers

All these attorneys are responsible under 5.1(b) for efforts to make sure the attorneys they supervise follow the rules and under 5.1(c)(2) for conduct they learn of in time to correct it.

Under 5.1(c)

Any of these attorneys could be responsible for another lawyer's conduct, regardless of their place in the hierarchy, if they ordered or ratified misconduct.

Outcome 6-d: Communication Skills 

Students should be able to discuss mistakes with others.

Assignment:

Problem 6-A: Difficult Conversations, pages 123-24.

As with all the communications skills in this text, this outcome is best learned and assessed by practicing the skill itself. Thus, I ask students to talk about the difficult conversation that they would have with Donald (in the preliminary problem) and write a short reflection on that experience. In a course with additional time, having students role-play a difficult conversation about a mistake (either their own or another's) could provide even better assessment. Here is the instruction I give to students:

Using the Preliminary Problem, think about how you might address the problem of Donald. Identify the steps you might take and the additional information you would want to have. One of the steps you (or some other attorney in your firm) might likely want to take is to talk to Donald about his recent actions. During class, you will work in groups to practice the conversation you might have with Donald. In no more than 250 words, reflect on what you learned from this exercise about having conversations with other attorneys about their behavior.

Assessment:

I rarely have time to observe all students in their practice conversations; however the quality of their reflections can be used to assess the degree to which they have improved their ability to conduct these conversations.

Outcome 6-e: Researching Issues in Professional Responsibility ⓘ

Students should be able to locate secondary sources that help them to understand professional responsibility issues.

Two research segments in this chapter are especially important for helping students to recognize the value and be able to use the key professional responsibility resources in practice: secondary sources and ethics opinions. Assigning the preliminary problem as a research assignment can be an effective way to assess student facility with these sources.

Reading and Research Assignment:

Preliminary Problem, pages 105-06 and Research Problems 6-A (page2 116-17) and 6-B (pages 125-26).

I use the preliminary problem involving Donald for the research assignment. Here are the directions I give to the students:

Read the Preliminary Problem on pages 105-06. Read Researching Professional Responsibility 6-A (pages 116-17) and 6-B (pages 125-26) and then, using the facts of the preliminary problem, answer the following questions:

1. Identify a secondary source that will provide you an overview of your potential liability for the errors of another attorney. Locate that source and provide a citation to the section or pages that will help you answer the question of whether you could be held liable in malpractice for Donald's errors if you simply refuse to help cover for him.

2. Research ethics opinions and provide a citation to an ethics opinion that provides guidance on your ethical obligations when you are aware than an attorney in your firm has a problem that may render the attorney unfit to practice. Provide a citation to the opinion and explain how you located it.

Assessment:

1. Students may use the Mallen & Smith Malpractice treatise, citing in particular portions of Chapter 5. Vicarious Liability. 1 Legal Malpractice § 5:1 (Introduction) or 5:8 (Employees) (2013 ed.); or they may find the ALR Annotation, *Liability of Professional Corporation of Lawyers, or Individual Members Thereof, for Malpractice or Other Tort of Another Member*, 39 A.L.R.4TH 556 (originally published 1985).

2. Students should locate either ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 03-429 (Obligations with Respect to Mentally Impaired Lawyer in the Firm) (June 11, 2003). I find that many students locate ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 03-431 (Lawyer's Duty to Report Rule Violations by Another Lawyer Who May Suffer from Disability or Impairment) (August 8, 2003) and stop there, without finding the more directly on point opinion. I use this as an opportunity to teach students the relationship between precision (what percentage of the research results one finds are on target) and recall (how many resources did the research results miss). I explain to students that one of the insights library science has provided us by examining this relationship is that if one's research query comes back with a large number of relevant results (i.e., it has high precision), that likely means that there are many more (and even more relevant) results to be found (i.e., the search has low recall).

You might also assign Research assignment 6-A using the problem asked there: whether there is a defense to malpractice that the judgment would not have been collectible. The general rule is that there is such a defense. Students could find this through the ALR, John E. Theuman, Annotation: *Measure and Elements of Damages Recoverable for Attorney's Negligence in Preparing or Conducting Litigation—Twentieth Century Cases*, 90 A.L.R.4TH 1033, §§ 17-18 (Originally published in 1991).

Outcome 6-f: Formation of Professional Identity 

Students should be able to identify their own risks for discipline or liability, based on their own strengths and weaknesses and the risks of their chosen practice area, and plan ways to reduce those risks.

Reflection Assignment:

Reflective Practice Problems, pages 110 and 128.

There are two reflective practice essays in this chapter: one on mistakes and one on professional development. I have found that students prefer the second to the first, likely because dwelling on one's mistakes is unpleasant and too personal to share. Take some time to normalize mistakes during class. Helping students to come to grips with the inevitability of mistakes and the habits of mind that cause and compound mistakes is difficult but well worth the time. I have had great success in the past with guest speakers from the state lawyer's assistance program to address this issue.

Assessment:

Because both these reflections require students to reflect on very sensitive issues of what students are likely to perceive as "failure" or "weakness," confidentiality and discretion in reading and providing feedback especially important.

Suggested Classroom Learning Activities

1. Set Up: Identifying Misconceptions

(Sections 6.1-6.4; Outcomes 6-a)

It is useful to address some common and vaguely true conceptions about competence. While one can do so by simply lecturing, it is even better if you can give students an opportunity to challenge those misconceptions themselves first. A short quiz can raise these issues:

1. Barbara is a first-year associate in a large national law firm. Associates are encouraged to take on pro bono work as a way of honing their skills. In the hopes of acquiring some courtroom experience and raising her profile with the partners, Barbara volunteered to take a criminal defense appointment for Arthur, the senior partner in her department. The court accepted Barbara as an additional attorney on the case but did not permit Arthur to withdraw. Although she had almost no background for criminal defense work and barely enough time to handle the case, she managed to meet with the client, prepare a strategy, and defend the client through trial. She did not ask Arthur for any advice or assistance and he did not offer to help because it was clear that the reason she was taking on the appointment was to relieve him of the time and responsibility. Her client was convicted. Later the conviction was overturned on appeal based on prosecutorial misconduct. The alternative claim for ineffective assistance of counsel, which alleged many fundamental errors in the defense provided, was not

addressed directly though the court of appeals did comment on the generally poor level of defense in dicta. Barbara has a complaint filed against her for violating Rule 1.1. Which of the following defenses would be effective, if any?

A. Barbara was a new, inexperienced attorney and this was her first mistake.
B. Barbara was representing the client pro bono so her representation was reasonable under the circumstances.
C. The conviction was overturned so there was no harm to the client.
D. Arthur failed to supervise her and he was the person responsible for insuring competent representation
E. Barbara was appointed to the case so she was immune from liability.
F. The client did not establish ineffective assistance of counsel, so a finding of incompetence would be precluded.

This is a variation on one of the review questions at the end of Unit One but designed to explore misconceptions more directly. With this one question you can address several common missteps in analysis of competence issues.

Choice A is a great place to start as it addresses the students' fear that they will not be competent and the hope that there will be some allowance for their inexperience. As a practical matter, of course, they will be incompetent for all but the most routine of legal work and will need to work to acquire competence and associate with more experienced counsel (formally or informally). As a matter of sanctions, the fact that an attorney is new and the mistake appears to be isolated can be mitigating factors. But the bottom line that students need to understand is that competence is a floor that all attorneys—even brand new attorneys—must meet.

I try to reassure students that the mistakes that get attorneys in trouble are most often grounded in management (missing deadlines, having too many cases, etc.), client relationships (poor communication), and attorney self-management (stress, substance abuse, other addictions) rather than substantive or procedural knowledge and skills and that mid-career attorneys get the most malpractice suits. I refer the students to the list of ten statements attorneys make when they get in trouble on page 107-09 of the text.

Choice B uncovers the "You get what you pay for" misconception (reason #7 for mistakes, page 108-09). Students need to understand that the minimum standards of competence under Rule 1.1 do not vary according to the level of payment, even if other standards in other rules may appear to lower the bar.

You can ask the students whether there is any truth to the statement that some clients are more protected than others. They should recognize from the readings that criminal defendants, in particular, have a much more difficult time enforcing competence standards against their

attorneys. You may wish to use this as an opportunity to review the test of *Strickland v. Washington, 466 U.*S. 668 (1984) and the relationship to malpractice, noted on page 118 of the text.

Choice C reflects the common notion of "no harm, no foul" and confuses the standards for malpractice, which does require damages, with the standards for competence, for which harm to the client is irrelevant to the determination of violation.

Choice D is the "following orders" defense (mistake #9 in the text, page 109).

Choice E reflects two misconceptions. First, that discipline is the same as liability and second that appointed counsel are necessarily immune from suit. (Students should be reminded this may be true for some appointed attorneys, and refer to page 116, but that this is not a blanket rule).

Choice E is confused on a couple of levels. First, "discipline" is not "liability." Second, while some defense attorneys (such as public defenders) have been given immunity from malpractice, there is little support for the proposition that immunity from civil liability creates any immunity from discipline.

Choice F confuses the relationship between ineffective assistance of counsel and discipline. A finding that there was not ineffective assistance of counsel is not the same as a finding that there was no incompetence because the second prong of the Strickland test (prejudice) does not exist in the disciplinary context. Moreover, state courts are reluctant to give preclusive effect to any other than criminal convictions or discipline from other states, and even then the disciplinary authority reserves the sanction decision.

2. Discussion on Varieties of Competence Regulation
(Sections 6.1-6.4; Outcomes 6-a)

Reinforcing the message from the text of the variety of ways in which competence is regulated can be accomplished by asking students to simply list the effects of an attorney's mistake and how to address mistakes.

Q. Attorney misses a deadline and the client has default judgment entered against him. What are the consequences to the attorney?
A. Students will readily recognize discipline and malpractice as two outcomes, but are slower to recognize the market remedies of the client not paying fees, not returning or referring business, loss in reputation among other attorneys, increased insurance rates, etc.

Q. What should attorneys do as soon as they realize they have made a mistake?

A. Review steps at bottom of page 109:

- Tell their insurer (This is the step students most often forget).
- Tell their client (This usually takes some discussion as to why this is so hard to do and what can make it easier—referring back to the "difficult conversations" readings in the text).
- Try to fix the mistake (e.g., relief from judgment).
- Maybe withdraw (if the client fires you, complains, or says they will file a claim againt you, or you otherwise believe you have a conflict with the client).
- Maybe settle the malpractice claim (Refer students to the limitations of Rule 1.8(h) on this).

Q. Should attorneys have to disclose to their clients whether they have malpractice insurance?

A. This is a nice little policy debate question that reminds students that rules continue to evolve. As of this writing, seven states require disclosure directly to client (AK, CA, NH, NM, OH, PA and SD). Eighteen states require disclosure on the annual registration statement (AZ, CO, DE, HI, ID, IL, KS, MA, MI, MN, NE, NV, NC, ND, RI, VA, WA and WV). Four states are considering adoption (ME, NY, UT and VT). One state mandates insurance (OR). Five states have rejected the rule (AR, CT, FL, KY and TX).

Q. If an attorney is liable for malpractice, does that automatically mean they have violated Rule 1.1?

A. The text raises this issue on pages 111-112. You might develop the theme more with the following points:

As a general rule, isolated instance of ordinary negligence will not result in discipline. Sometimes, that's because the law says ordinary negligence is not enough—for example, the California rule says that an attorney "shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence" but under the literal language of the Model Rules, a single act of incompetence can be enough to be subject to discipline. There are examples of attorneys being disciplined for single acts of negligence—*See, e.g.*, *State ex rel. Oklahoma Bar Ass'n v. Bolusky*, 23 P.3d 268 (Okla. 2001)(negligence in prosecuting single case provided basis for suspension from practice).

You might also refer to ABA Standards for Imposing Lawyer Sanctions (I distributed portions of this early on in the semester). Standard 4.54 suggests that an admonition is appropriate discipline for an attorney who "engages in an isolated issue of negligence."

As a practical matter, one instance of negligence is unlikely to result in discipline. A fun analogy to think about comes from maritime law, where insurance companies don't have to pay for "unseaworthy" vessels. Incompetence while manning a vessel is sufficient to render the vessel unseaworthy, while mere negligence is not. *Catlin v. St. Paul Fire and Marine*, (S.D. Tex. 2005). The question ultimately is "what is the condition of the vessel?" Some mistakes don't suggest a risk of future mistakes, but others, like not researching when taking on unfamiliar cases, do.

See generally, The Florida Bar v. Neale, 384 So. 2d 1264, 1265 (Fla. 1980) (stating the "rights of clients should be zealously guarded by the bar, but care should be taken to avoid the use of disciplinary action . . . as a substitute for what is essentially a malpractice action"); *In re Complaint as to Conduct of Gygi*, 541 P.2d 1392, 1396 (Or. 1975) (stating "we are not prepared to hold that isolated instances of ordinary negligence are alone sufficient to warrant disciplinary action"); *Committee on Legal Ethics v. Mullins*, 226 S.E.2d 427, 430 (W.Va. 1976) (stating "[c]harges of isolated errors of judgment or malpractice in the ordinary sense of negligence would normally not justify the intervention of the ethics committee"), *overruled on other grounds*, *Committee on Legal Ethics v. Cometti*, 430 S.E.2d 320, 330 (W.Va. 1993).

3. Lecture on Regulation of Attorneys
(Sections 6.1-6.4; Outcomes 6-a)

I try to avoid lectures summarizing the law, even though students love these lectures, because I believe class time is much better used for more active engagement by the students. However, if you want to emphasize the doctrinal content of this chapter more, you may find the slides in the electronic resources to be a useful device for such a lecture. If I am lecturing to cover a range of doctrine, I try to be sure to give students a handout so they do not feel like they must transcribe the screens and can, instead, think about the ideas being conveyed. An incomplete outline can be especially effective for this purpose.

4. Discussion of "The Top Ten Causes and Cures of Attorney Troubles"
(Section 6.1 pages 107-110; Outcomes 6-a, 6-b, and 6-f)

I build on the list of causes of mistakes by assigning students the task of coming up with "cures" for the ten causes in the text. This is an excellent assignment to use a "gallery walk" technique. Divide the class into small groups and give each a large piece of flip-chart paper or posterboard. Assign each group one of the items on the top ten list. They should then prepare a summary of the problem and the causes and then describe their best "cure" or prevention strategy for the problem. You can begin by demonstrating with one of the items on the list yourself. Then give the groups time to work on their poster (generally 15 minutes is more than enough). Post the results around the room and instruct the class to then walk around the room and read each poster.

You can give students the opportunity to annotate the posters with additional comments or you can ask for comments on each poster after everyone has had an opportunity to read them all. (Alternately, you can have each group use a laptop if you have the capability of sharing and displaying their work, but the physical engagement of the gallery walk technique is a little more active. If you use this approach, students should be directed to prepare three PowerPoint slides (problem/causes/cure) with no less than 28 point font. Display the resulting PowerPoints one after another and ask for brief feedback on each.)

Here is the example I give the students:

I had a feeling…

Problem: Certain cases or clients cause alarm bells to go off but you ignore them. These cases then become ones you put off because they are so unpleasant.

Causes: Inexperience makes us not trust our instincts; economic pressures cause us to take cases and clients against our better judgment.

Cure: Have a client screening protocol that includes questions designed to identify clients who are likely to be too demanding, emotional, unrealistic (whatever are troublesome clients for you), and a system for easily turning down these clients.

Here are some other examples of what the students might produce:

A. Time Got Away

- Problem—Missed deadlines: Failure to know, failure to calendar, failure to meet
- Cause—Too high caseload, poor management system, procrastination (Model Rule 1.3 cmt 3)
- Cure—Manage caseload (Rule 1.3, cmt 2) by having a case intake system; Hire someone or buy software that will improve time management and provide multiple ticklers for deadlines and then be ruthless in using it; Have a contingency system in place to get help before you need it.

B. It's All Too Much

- Problem—Attorney breakdowns.
- Cause—Poor self-knowledge and self-management; addictions and mental health challenges
- Cure—Know yourself and your risk factors; Be strict with yourself about stress management; Be able to get help when you need it (Lawyer Assistance Programs)

C. If It Weren't for the Clients

- Problem: Communication is too little, too late, too confusing, too rude, too difficult, or too expensive
- Causes: Client and Attorney Expectations, Attorney human relations skill and client service orientation, Management systems

- Cure: Get training to improve communication skills or hire an assistant who is good at client management.

D. I Was Only Trying to Help

- Problem: Full heart—empty head decisions about advice, actions, and representations lead to conflicts, incompetence, discipline.
- Causes: Inability to say "no"
- Cure: Caseload management

E. I Wasn't Getting Paid

- Problem: Incompetent or unethical representation of nonpaying clients.
- Causes: Ignorance of rules of professional conduct
- Cure: Attitude adjustment

F. I Was Only Trying to Get Paid

- Problem: Malpractice or discipline actions precipitated by collection efforts
- Causes: Poor business practices
- Cure: Advances on fees; Regular and prompt billing; screening of clients.

G. I Had No Idea

- Problem: Incompetence because you are out of your depth, either procedurally or substantively
- Cause: Identifying your own level of competence is a fundamental skill (See Model Rule 1.1, cmt. 2)
- Cure: Either be competent, have the time and resources to become competent, or associate with another attorney who is competent

H. I Was Just Taking/Giving Orders

- Problem: Responsibility for someone else's incompetence
- Cause: Misunderstanding rules regarding shared responsibility; eco-nomic/professional pressures
- Cure: Knowledge of standards—if you share responsibility (generally or specifically), you share liability; "taking orders" is not a defense for a clear violation

I. But I Didn't…

- Problem: Allegations of incompetence that you cannot defend
- Cause: Poor documentation; risky representations ("appearance of impropriety")
- Cure: Document, document, document; Avoid "line-walking" on conflicts

Whether I use the "jigsaw puzzle approach" (See III-H in Part One of this manual) or simply have a general discussion of these mistake categories, I like to summarize the suggestions with my RRRRULES for Risk Reduction:

- REFUSE
- REFER
- RESEARCH

- REGULARIZE
- RECORD
- be REALISTIC
- RELAX

5. Simulation: The Difficult Conversation
(Preliminary Problem, p 105 and Section 6.5, pages 119-127; Outcomes 6-c and 6-d);

There are several ways to address the preliminary problem as a simulation. You can ask the students to break up into teams and practice the conversation they might have with Donald, or you can ask for volunteers to demonstrate some different conversations and have the rest of the class make suggestions, or you can bring in a guest speaker (the lawyers assistance program is one source or you could bring in some managing partners to talk about how concerns and mistakes are addressed in their law firm). For more guidance on using simulations, see the teaching techniques section in Part One.

It's important that students have an opportunity to process this notion of responsibility for one another, so I assign a short reflection paper. You can also simply take some time to de-brief the exercise or guest lecture at the beginning of the following class.

6. Text Review Problems
(Review Problems Page 125: Outcomes 6-a and 6-c)

The review problems on page 125 are designed for basic review of the doctrinal content of the chapter along with some review of prior chapter content and some preview of coming attractions. If you use short essay questions such as this on a final exam, you can point to these as samples.

1. He is not subject to liability. It is arguable that there was no attorney-client relationship given the informal context of the advice-giving and the disclaimer of sorts that Arnie provided. However, mostly there is no liability because there are no damages. Likewise, Arnie is unlikely to be subject to discipline. In the context of the relationship and the questions posed, Arnie's response was based on the amount of research and preparation "reasonably necessary" for the circumstances—that is, an informal request for an informal response.

2. Unless Attorney has other information indicating that the prior attorney had a pattern of incompetence, simple negligence does not rise to the level of a violation of the rules that raises a substantial question of the attorney's fitness. Moreover, even if Attorney did have a duty to report, he could not do so without the client's permission, as the information would be

confidential. Attorney certainly have a duty to advise client about a possible malpractice action against the prior lawyer as this is important information about the status of the case. Rule 1.4.

3. Attorney's client may bring an ineffective assistance of counsel claim, which might lead to the client's conviction being overturned. Client could not, in most states, bring a malpractice action against Attorney until the conviction was successfully appealed (in some states, an even higher burden of exoneration or actual innocence is required). Finally, attorney may be subject to fee forfeiture as a court may refuse to enforce the fee agreement.

7. Closure: What's on the Exam?

(Test Your Understanding, page 129; Outcomes 6-a and 6-c)

If you do not use this class time for doctrinal review, the students often will want to know "How are you going to test this?" Giving the students some ideas of how you might include the material from this chapter on a final exam lets them know that it is important and gives them fair warning of testing options. One way to test is to give students a "case study" of a mistake gone bad (which could be a hypothetical that would also test doctrinal application) and ask them to "rewind" and explain what they think led to the mistake and how the attorney could have prevented or rectified the mistake.

I like using "react to this statement" questions for testing basic doctrine on final exams. The "Test Your Understanding" statements on page 129 could be models for these type of questions.

The first statement explores the misconception that competence depends on payment. While there is nothing on the face of the rules to support such a notion, the students might point out that, while the floor of competence is the same for all clients, that floor is enforced differently for some clients than others because of limitations on malpractice for certain practice areas. Likewise they might comment that competence is only a floor and that attorneys may provide extra-quality service to some clients than others for a number of reasons, including whether that client is paying.

The second statement explores the misconception that grades measure all the qualities of competence and that mistakes are because of incompetence, as opposed to the many other reasons that make up malpractice, including different risks of different practice areas, greed, poor management, poor communication skills, stress and addiction, etc.

The third statement is meant to cause students to reflect on the risks of mistakes. While owning up to and correcting mistakes is better than ignoring them, learning from them so that they don't happen again is equally important.

Chapter Seven: Fees, Files, and Property

Once again, this is a chapter that could benefit from two or even three class periods, particularly if you want to include some of the practical skills instruction in drafting. Much of the doctrine can, however, be taught in the context of drafting, if you use the class time to present various contract clauses to the students and have them not only critique the drafting, but identify the enforceability and ethics of the various clauses.

Outcomes, Assessments, and Assignments

Outcome 7-a: Reading and Analyzing Lawyer Regulation

Students should be able to:

- explain the relationship between fees and other central duties in the attorney-client relationship;
- analyze a fee for reasonableness;
- analyze billing and collection practices for conformity with rules of professional conduct and agency principles;
- explain the essential elements of a client trust account and describe the funds that must be deposited or kept in a trust account;
- differentiate an advance on fees and a retainer and identify the ethical risks of pure retainers; and
- identify the various approaches to ownership of client files.

Reading & Problem Assignment:

Chapter 7. Review Twenty Questions on pages 150-51.

There is a lot of basic doctrine to cover on this topic and, if students don't learn to appreciate this doctrine, they can end up with serious discipline. I have used a "Twenty Questions" assignment to guide student preparation and address much of this basic material. Here is the instruction I give to the students:

> Come to class prepared to answer the twenty questions at the end of Chapter 7. Include citations to the rules to support your answer. We will review these briefly at the beginning of class.

Assessment:

I follow up this class with a "I'm still confused about…" minute paper to assess student understanding.

Outcome 7-b: Practice Management 1

Students should be able to explain the reasons it is important to keep track of their time in practice and maintain time records that communicate work completed and time spent.

Reflective Practice Assignment:

Reflective practice assignment 7-A, page 140. Using this assignment, I give students the following instructions:

> Try keeping your time spent on law school for one week. Consider each class, organization, or office a separate "client." At the end of the week, reflect on your timekeeping skill, following the suggestions in the Reflective Practice assignment in the textbook.

This has been one of the most successful assignments I have given students. I report back to the students after reading their reflections generally but I also given feedback on each reflection. I have students submit their reflections electronically and I keep a set of common comments in a word file and cut and paste them into the papers using the comment feature. Here is an example of my individual comment bank

- Your observations about the rounding issue are at the heart of much of the criticism of the billable hour—rounding up bills for time not spent, rounding down means we don't get paid for our work, working to the increment means we're working just to fill the clock, and no rounding at all is an administrative nightmare!
- Absolutely keeping track of the timekeeper and remembering to monitor your time are two of the hardest parts of timekeeping—many folks are finding technological assists will make this much easier in the future.
- It is indeed tedious and difficult and everyone loses some time or feels like they can't ethically bill for time they know they have spent (but were distracted, unsure of the time, etc.). Everyone has to learn how to keep time in a way that works well for them. The trick is to try a system long enough to get used to it and see if it works. No system is without a learning curve.
- You can see from your experience why attorneys need to block out uninterrupted time. Not only is multitasking inefficient but it makes tracking time very, very difficult.

- Email and other electronic interruptions are a challenge for us all. Like any other interruptions, most attorneys find that they must schedule time for these communications and carve out uninterrupted time when they simply aren't to be disturbed—in person or by electronics.
- Your observation that keeping track of time helps keep you focused is one that many students noted. I'm glad you found the exercise helpful.
- It is indeed difficult to know what to do with all the time you spend thinking about work but that is merely that—thinking. It's valuable, but if it's happening in the car, in the shower, in the middle of the night, well, it's hard to convince a client that they should pay for that.
- Excellent observations! Your comment that much of the overbilling that occurs is the result of negligence as much as dishonesty is a good one.
- I'm glad you've found a system already that you are comfortable with and works well—many people have to try two or three different systems before they find one they can work well.
- Fabulous observation about quality v. quantity of time spent on a matter. It is indeed a tricky equation and one of the main reasons clients and attorneys alike are looking for alternatives to the billable hour.

My favorite comments by students:

- I was planning to do my Civil Procedure homework like I always do on Sunday afternoon, while watching the football game, but then I thought, "Could I bill a client for working while I watch the game?" and I thought I shouldn't do that. So I did my homework first and then watched the game. Not only did I get my homework done faster, I enjoyed the game more!
- Could I, in good faith, count time toward the task when I was in class if I wasn't paying particularly close attention?
- By recording every task this week, it really put into perspective what I am investing my time and life in.
- This experience proved somewhat akin to sticking pencils in my eyes.

Outcome 7-c: Communication Skills

Students should be able to identify common drafting problems in an agreement regarding fees and file retention.

Drafting Assignment:

Professional Responsibility Skill 7-B: Documentation, page 149.

I ask the students to use the guidelines provided there and make two suggestions to improve the agreement, which they are to turn in before class.

Assessment:

By identifying only two revisions to the document, you can provide feedback to students without undue burden. Students should recognize the legalese or vague references in the documents and should question whether document retention provisions are consistent with the governing law in the jurisdiction. Many state bar associations have excellent guidance for fee agreements. For example, for my students, many of whom will practice in Missouri, I recommend the Client Trust Account Handbook at http://members.mobar.org/lpmonline/practice resources.html (along with other helpful resources like sample fee agreements, client keepers, and the economic survey).

Outcome 7-d: Formation of Professional Identity 

Student should be able to identify their own attitudes toward time and money that will make time keeping and billing easier or harder.

Assignment:

There are several options for important reflection in this chapter. The reflective practice prompt on page 138 is important, but students sometimes resist the hard questions it asks. If you assign this reflection for your review, be sure that you do so in a way that allows students to critique or disagree with Professor Lerman's description.

The timekeeping reflection will often generate effective reflection on the student's relationship with money, since the experience is very immediate and concrete.

Another immediate experience students are often unwilling to tackle is the amount of debt they are carrying. Try using the following reflection prompt for students to consider this issue:

Many students will have to repay student loans upon graduation. Do you know how much your monthly payment will be? If not, why not? If so, how has that impacted your educational and career choices? If you will not have student loans to repay, how has that affected your educational and career choices?

Assessment:

See appendix for guidance on assessing reflection.

Outcome 7-e: Researching Issues in Professional Responsibility ⓘ

Students should be able to find information to answer questions they have about practice issues.

Research Assignment:

Because students are often very interested in fee issues, you can easily assign a research assignment for this chapter. You can assign exercise 7-A on page 150 or, instruct students to ask a question about fees and then research and see if they can find the answer. This can then be the last question on the Twenty Questions review.

Alternately, if there is a particular controversial issue or recent change in the law that you would like to address, assign the students to research that particular issue and be prepared to report.

Assessment:

To truly reinforce the lessons on research, be sure that you review not only what resources they found, but how they arrived at these.

Suggested Classroom Learning Activities

1. Set Up: Why Fees are Important

(Chapter 7; Outcome 7-d)

Because this class can be very focused on the details of the rules regulating the business of law, I like to begin by connecting the topic to the broader themes of the Unit. I ask students to give me one example of how an attorney's approach to fees impacts the following core ethical duties to the client? I ask students to choose one of the duties and give an example of how fees impact that duty. Because we have just finished competence, they are more able to provide examples there than they are for the remainder, but thoughtful students (or those who have read the text carefully) will be able to provide examples for all four core duties.

- Competence? (e.g., if you don't charge enough, you won't be able to do a good job because you'll have to take on too many cases)

- Confidentiality? (e.g., to collect your fees, you may have to disclose confidential information)
- Communication? (e.g., billable rates may affect how willing clients will be to speak with you or you with them)
- Conflicts of Interest? (in a sense, any fee is a conflict, since you want to make money and your client wants to keep costs low).

2. Reviewing the Twenty Questions
(Chapter 7, Outcome 7-a)

If you only have one class session to cover this material, you will need to review the 20 questions students have prepared for class as quickly as possible. I have sometimes announced that we will review "20 questions in 20 minutes" (but I've never actually been able to move that quickly). Distributing a handout summarizing the answers speeds up the review and keeps students thinking instead of trying to transcribe. Another method to move class quickly on this review is to make this a quiz show style game and award prizes. Finally, you can simply post the answers for students and only take questions on those that students are most confused about.

The following is an example of the handout I provide to students for review, with additional comments in brackets for your review.

20 Questions on Fees Handout

1. Can you trade goods or services as payment?

Yes, if payment is reasonable (Rule 1.5) so long as it's not media rights (Rule 1.8(d)) and so long as you are not acquiring an interest in the subject matter of litigation (until the lawsuit is over) (Rule 1.8(i)). Comment 4 to the rule reminds attorneys that a "fee paid in property instead of money may be subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client."

[It is important to preview these conflict of interest rules at this point, though it does then require distinguishing between a contingent fee paid in property (which is acceptable) and having the client essentially assign an interest in the lawsuit by paying the attorney before the lawsuit has concluded. Students are often rightfully confused that there is considered to be more conflict of interest in giving an attorney an interest in the lawsuit that they retain, win or lose, than in giving an attorney an interest that they only acquire if they win. A little history—explaining the practices of champerty and maintenance—can go a long way toward explaining the difference.]

2. Can you use billing methods other than hourly or contingent fees?

Yes, you can combine billing methods (e.g. hourly + contingent) and you can charge flat fees or "value billing" so long as the fee is not unreasonable and doesn't interfere with the client's right to settle or to fire you.

[Students are often very interested in learning exactly how these alternative billing arrangements work. Law practice management websites of various state bar associations often have very helpful explanations of these alternative methods.]

3. What is a reasonable fee?

As a practical matter, a fee is reasonable if:

a) Negotiated fairly and client understands it
b) Doesn't attempt to circumvent limitations on fees
c) Not grossly disproportionate to the work done
d) Not grossly disproportionate to the value received
e) Not grossly disproportionate to that charged by other attorneys with similar skills for similar work

[On page 136, in the "Reasons" section of the rule reading guide, the text asks students to identify the interests protected by different parts of Rule 1.5(a). The point of this question is to note that some aspects of reasonableness have more to do with the attorney's business interests (e.g., lost opportunity costs of (2) or market rates (3)) than do other factors that relate more closely to the client's interests. Students need to understand, while fee disputes result in many complaints to disciplinary agencies, there is less discipline for charging unreasonable fees because, as a practical matter, fee mediation programs of state disciplinary agencies are where most disputes regarding reasonableness are worked out. At the same time, they should recognize that fee disagreements are never worth the loss of goodwill, time, and risk. Likewise, they should recognize that, just because discipline is rare, doesn't mean it doesn't happen. The more the fees are, the more likely a court is going to question reasonableness. For example, the court in *Peebles v. Miley,* 439 So.2d 137 (Ala. 1983), when asked to assess the reasonableness of the practice of attorneys charging 15% of the value of property in bank foreclosures, regardless of the work involved:

"As the amount of the recovery increases, the attorney's fee should be prudently reduced. Otherwise, we would have the anomalous situation of a routine collection of a promissory note of $2,000,000.00 and an attorney's fee of $400,000.00. The determination of a reasonable attorney's fee should not be done in a wooden, inflexible manner, but should be done so that all factors will be given their proper interplay."

4. Can you discount or increase according to ability to pay?

Yes. The rules encourage "low-bono" (Rule 6.1). Likewise, so long as the fee is in a range of reasonableness, you can also charge some clients more than others. Students need to recognize that pro bono comes at a cost, and that many law firms spread that cost to other clients in the form of increased fees.

[On page 137, under the "Imagine" section, students are asked to imagine other factors, not listed in the rules, that could be a factor in reasonableness. This is one example.]

5. Why are contingent fees so controversial?

Because attorneys make a lot of money compared to the work they put in on one case (though averaged across cases, their hourly rate equivalent isn't necessarily that high);

Because attorneys have a stake in the outcome, which creates a conflict of interest of sorts, leading a few attorneys to stir up fraudulent litigation;

Because attorneys who use contingent fee agreements often sue entrenched or powerful interests.

[The politics behind contingent fees can generate some heated debate in a classroom. Be sure to keep discussions balanced and encourage students to avoid overgeneralization. I find that asking students to propose alternatives is the best method for keeping discussions focused on broader policy questions.]

6. Why can't you charge contingent fees in a divorce case or a criminal case?

Because contingent fees are not necessary in either case (fee shifting in divorce and public defender in criminal cases)

Because we don't like the perverse incentives it might create (discourage reconciliation, condone perjury)

Because there's no financial "stake" in most criminal law cases and the financial "stake" in family law cases belongs to the children.

[Students sometimes have a difficult time recalling these justifications. Poll the students for their agreement and challenge them to propose alternatives to serve the same policies. The prohibition has been under pressure from the matrimonial bar for a long time, with "creative" attempts to

circumvent the rule by characterizing "results obtained" fees in divorce actions as "bonuses." The attorneys argue that this is not a contingent fee because it is not based strictly on winning or losing but merely on the amount of the final financial recovery. Some courts have approved this approach while others have flatly rejected it. I like to point out these cases as an example for the students to be careful with "quibbling" with the rules. My favorite case on the subject is from the Supreme Court of Oklahoma, which held that "any fee arrangement in which the attorney will receive an enhanced fee if his efforts produce a more favorable property division or alimony award to his client involves a personal interest because the greater amount he obtains for his client, the greater he can charge as a fee." *Okla. Bar Ass'n v. Fagin*, 848 P.2d 11, 14 (Okla. 1992). Notably, the attorney in this case had learned to negotiate this "results obtained" fee agreement at a state bar association CLE program, a fact which the concurring judge found especially troubling.]

7. What is an example of a law that puts a cap on attorneys' fees?

Mostly in areas of law in which we are concerned about the effects of large fees on third parties or the public fisc (e.g. bankruptcy, workers comp).
Some states cap fees in malpractice actions.
When the government is paying the fee (e.g. appointed representation)

[Providing an example of these statutes or asking students to research to find these can be helpful to students understanding how these caps might work in practice.]

8. What is the lodestar method?

Method of accounting for fees in fee shifting cases
Reasonable hourly rate x reasonable hours is the "lodestar"—Must prove any variation
Sometimes used in quantum meruit cases
You ordinarily cannot collect from your client if you are awarded fees from the other side

[If students are especially interested in why the American Rule does not ordinarily provide for fee shifting, you may refer them to the CALI lesson on the topic, which provides an interactive extended debate on the value of each method. http://www.cali.org/lesson/776. Providing students with examples of fee-shifting statutes in your jurisdiction can be quite eye-opening for them, as they are rarely aware of how many of these statutes there are in a range of fields of practice. At the federal level there are about 200 statutory provisions for fee shifting, primarily in civil rights, environmental, and consumer protection statutes, not to mention the Equal Access to Justice Act, 28 U. S. C. §2412, providing for fee shifting in many cases against the government.]

9. Why keep time if you aren't billing on an hourly basis?

Allocating profits
Collecting fees from others
Reporting (e.g. CLE hours)
Defending discipline
Conflicts checking
Efficiency awareness
Concentration and focus

[If you assign the timekeeping assignment, the students will generate these answers much more readily.]

10. How do you keep time?

Record the time contemporaneously
Use reasonable increments (beware "rounding up")
Describing the activity (codes help)

[Again, if the students have completed the timekeeping assignment, this list will have much more concrete meaning for them.]

11. What are some examples of unethical time-based billing?

Churning, Chipping, Double charging, Padding

[I have found that some students become quite upset to learn that some of the practices on pages 131-32 at the beginning of the chapter are considered violations of the rules, particularly the double billing of one client for travel and another client for the work done while traveling. You may wish to walk through each of the preliminary problem. For further guidance on that exercise, see #5 Billing Practices Review below.]

12. What is the difference between a retainer & an advance?

A retainer is a payment that belongs to the attorney when made, goes in the attorney's account, and represents lost opportunity or the absolute value of the attorney agreeing to represent a client. It is almost always unethical.
An advance is an advance payment of fees and goes in the client trust account until earned or refunded. It is highly ethical if reasonable.

[The vocabulary can be quite confusing to students, as attorneys in practice often use the term "retainer" when in fact they are speaking of "advances."]

13. How to make sure clients will pay?

Screen clients
Get advance payments
Make clear agreements
Communicate value
Bill early and often
Withdraw early if you anticipate problems
Use attorney's liens in contingent fee cases (if allowed in your state)
Include ADR clauses for fee disputes

[Remind the students that, whatever method the attorney uses to collect fees cannot violate the rules of professional conduct in other respects. This helps students to understand why attorneys have to be especially careful in involving third-party collection agencies in billing and collection. This is also a good point to remind the students that one method that attorneys cannot use to collect fees is to refuse to hold legal services hostage by refusing to appear in court or take other necessary steps in the representation while also not withdrawing.]

14. If you have a contingent fee and the client fires you before the case settles, can you still collect?

If the client had good cause to fire you, you may have to forfeit your fees
If the client didn't have good cause to fire you, you can sue for quantum meruit (based on reasonable hours worked up to the limit of the contingent fee), but only after the case is over (i.e., a settlement or judgment received).

[Students may ask what happens if another attorney picks up where you left off also on contingent basis. Explain that both attorneys may have a claim to their contingency, but that, as a practical matter, the attorneys should work out an agreement between them to split fees in a way that would be consistent with the rules, lest they both find themselves facing a disciplinary complaint, fee forfeiture, or a costly fee-battle.]

15. What is an IOLTA account and who has to have one?

An interest bearing trust account in which the interest is sent to the "Interest on Lawyer's Trust Account" foundation instead of the client
Every attorney who has client money

[I try to take the time to explain to students how a trust account works and refer them to the Missouri Bar Association Trust Account Handbook, which provides excellent guidance on the details.]

16. Why do I have to turn over files to a client who hasn't paid just so they can give those files to some other attorney?

Because the balance of protecting your economic interest and protecting your client's legal rights has been tipped in favor of the client. So bill early and often and take care of your clients so you aren't in this position. Be sure that you know what your jurisdiction's position is on what constitutes the client file.

[I don't generally spend a great deal of time on the *Swift, Currie, McGhee & Hiers v. Henry* case except to briefly review administrative documents (internal assignment memos, conflicts checks, etc.) from client file documents and the end-product v. work-product distinction in the minority of jurisdictions that apply that distinction.]

17. Do I have to report another attorney's overbilling?

If an attorney is intentionally overbilling that violates the rules and raises a substantial question of honesty, so if you know an attorney is engaged in overbilling, you most certainly do have an obligation to report, unless that would violate client confidentiality?

[Students are often spooked about reporting another attorney's overbilling and are especially concerned that they will learn of overbilling often and will lose their jobs without recourse if they report. I try to reassure them without sugar-coating the problem. First, I remind them that the reporting rules are designed to leave a generous measure of discretion for them within which to operate, in that reporting is only required first if they know of overbilling. Rumor, speculation, or mere suspicion is not enough. On the other hand, the test is an objective one, so they can't turn a blind eye when they have a substantial basis for a clear belief or actual knowledge of misconduct, which is based on relevant facts. Second, they should remember that in most states, not all rule violations must be reported, only violations that raise a "substantial question" regarding the attorney's honesty (though intentional overbilling nearly always will create that substantial question). Third, they should know that, despite early cases that flatly rejected wrongful termination actions, in most instances if an attorney's overbilling is not a product of an entire firm's practice, the management of the firm is just as likely to be grateful that the attorney has unearthed what could be a problem for everyone. But even if the firm does firm the reporting attorney, most courts do not leave the attorney entirely without protection today. The attorney may have a breach of contract claim: (employee handbooks, company policy statements, etc. have been found to create implied contracts) even if the state does not recognize wrongful

discharge claims. Most states today do provide wrongful discharge claims under a public policy exception to the at-will doctrine. Finally, students should be reminded that turning a blind eye to intentional overbilling is not without risks as well. There are risks of complicity and possible liability, as well as the cost of conscience and reputation (the risk of inuring oneself to unethical practice and joining the unethical attorneys in the mud).]

18. How do you share fees with another attorney?

Within a firm, however you choose (but make sure it's clear so you can avoid the kind of fights you can read about in cases like *Welch v. Davis*, 114 S.W.3d 285 (W.D. Mo. 2003))
Between attorneys not in the same firm, see rule Rule 1.5(e).

[The increasing mobility of attorneys makes the splitting of fees among attorneys formerly within the same firm an increasingly troublesome area.]

19. Which rules apply? When do you use the ABA rules and when do you use state rules?

Trick question! You don't use the ABA rules as sources of law—they are Model rules. You only use the state rules (which are, in all states except California, modeled on the ABA rules) when you are talking about discipline or the federal courts or agency rules when you are talking about practice before that court or agency.

3. Drafting
(Drafting exercise 7-B, page 149, Outcome 7-b)

Review the clauses in the in the text. It may not be as apparent to the students as it will be to you how inflated and vague the language is in these clauses. Nor will students readily be able to spot the portions of the file retention clause that likely permits the attorney to retain portions of the file that the law may require be turned over to the client.

An effective way to get students to identify problems and at the same time reduce your need to provide extensive written feedback on the assignment is to assign students before class to identify two of the biggest problems and revise the language to solve those problems. During class, have students pair up and compare their two problem/revisions and choose the two that they most agree on. Then have each pair select another pair of students and between the four of them choose the two problem/revisions they all can agree are the most significant. You can even do this one more time, having a group of eight agree on the top two (or three) problem/revisions.

Then have each group report out. By the end of this process, students will have identified the majority of the problems in the agreement.

Some general comments on the clauses:

Fees

1. Does a client really understand what a "billable hour" method means?

2. Using "shall" creates a duty, when the duty is the clients "fees are due…" "Rendering of legal services" sounds like melting fat. Likewise, the obligation that the client "deliver the fee" (as opposed to "pay") is stilted and unclear. Finally, "reasonably timely manner" is a phrase just waiting for argument.

a) The attempt to define "rendering legal services" only makes it worse. Moreover, it ups the ante on the attorney's duty of due care from reasonable to "best of the law firm's ability." See *Abramson v. Wildman*, 964 A.2d 703 (Md. Ct. Spec. App. 2009)(breach of contract based on statement in client engagement letter that the client "may expect our firm to be both sensitive and professionally responsive to your situation.").

b) Why would an agreement refer to a method "previously agreed upon"—if it's been agreed upon, it should be in the agreement. Moreover, using a debt collection agency could pose risks of breaches of confidentiality, for which this agreement would almost certainly not be considered informed consent.

c) Since it's still unclear when the services are "rendered" (other than perhaps when the case is "resolved") it's hard to know when this 14 days begins to run. It's foolish practice to put off billing all fees until after a case is entirely over.

d) This is a frightening clause—what does it mean that the attorney and client can modify the agreement with mutual consent? As a matter of contract law, what is the effect of expressly making this aspect of the contract subject to modification? This clause invites more trouble than it solves.

Files

A review of the files paragraph can provide a basis for reviewing most of the major rules regarding file retention.

The first sentence is simply not true—one can imagine a number of documents that the attorney might obtain during the representation that "relate to the client" that should not be considered belonging to the client. Consider, for example, the firm's financial statements and tax returns, or originals of documents that belong to witnesses, for example.

The second sentence's reference to "personal notes" of the attorney is both cryptic and, in many jurisdictions, an attempt to secure the client's waiver of a right that may not be subject to waiver.

The third sentence reference to "These documents" is unclear given that it follows the reference to the attorney's "personal notes."

The fourth sentence puts the onus on the client to request the file; whereas the attorney's duty under Rule 1.16(d) is to return the file regardless of the client's request.

The fifth sentence has several problems. First, it contains my pet peeve of legalese—the use of "said" as a relative adjective instead of "the" or "that." While many jurisdictions permit the shortening of the document retention period by agreement, the predicate here is the client "electing not to have the documents returned." How is an attorney to know that a client has made that election? Does this mean the file cannot be destroyed unless the client affirmatively disclaims a right to the file? Finally, the sentence creates an affirmative duty on the firm to destroy the file—which would be foolish and, for some documents, unethical.

The sixth sentence is directly contrary to the law in some states which provides that the attorney must pay for copies. *McKim v. State*, 528 N.E.2d 484 (Ind. App 1988), *In re Admonition Issued in Panel File No. 94-24*, 533 N.W.2d 852 (Minn. 1995).

Finally the last sentence is an attempt to create a lien on the file, which is a fee-collection remedy that in most states is severely restricted if not prohibited.

5. Practice in Reading Fee Regulation
(Section 7.2, Outcome 7-a)

I give the following problem to the students to practice their skills in reading rules and to emphasize that fees can be regulated by sources outside of the rules of professional conduct. You could also assign this as a research problem, asking the students to find the IRS regulation.

You have been engaged as staff counsel for a 55-person firm in your state. Your job is akin to in-house counsel for the firm and your responsibilities include maintaining continuing education reporting and programs for all attorneys, conducting and resolving firm conflict of interest issues, negotiating for and maintaining the firm's malpractice insurance, and providing ethics compliance counseling. Today you received the following letter:

Dear Ethics Expert

I really appreciate your being willing to help me think about ethics issues as they arise in my practice. I think it's great that the firm has hired someone just to help us on these issues.

I have been representing Mr. Sam Smith regarding some business planning issues. Mr. Smith owns Smokin' Smith on Wheels—that great chain of barbeque food trucks you see parked around town serving burnt end sandwiches. He has been preparing to bring a partner into the business.

I have been working with Sam over the past three months to prepare for a structuring the partnership formation. One of the big issues he needed help with was the valuation of the business. He indicated that his business was a largely cash business and was having some difficulty valuing the business because of that. He provided me with a set of books indicating the cash flow of the business and I helped to prepare for negotiations with the purchasers based on those books. One of the things I noticed right away was the inefficiency of the way he has structured his business and accounting methods from a tax standpoint. I suggested to him that, apart from his desire to bring in a partner, he should immediately restructure the business and he could recognize immediate, substantial tax savings—at least $18,000 a year based on my estimates of next year's projected tax return.

I talked to Sam about this idea and he was very interested. He proposed that I work on this restructuring, in addition to the partnership planning, and help him prepare his 2013 returns based on this planning and, in return, he will pay me 40% of the tax savings he realizes if the new approach is successful. I estimate that my work on this project will take, at most, ten hours. If the IRS successfully challenges the return, I will refund the fee.

I've done a little research, and found this section of IRS Circular 230, which governs practice before the IRS

31 CFR Section 10.27 Fees

§ 10.27 Fees.

(a) In general. A practitioner may not charge an unconscionable fee in connection with any matter before the Internal Revenue Service.

(b) Contingent fees—

(1) Except as provided in paragraphs (b)(2), (3), and (4) of this section, a practitioner may not charge a contingent fee for services rendered in connection with any matter before the Internal Revenue Service.

(2) A practitioner may charge a contingent fee for services rendered in connection with the Service's examination of, or challenge to—

(i) An original tax return; or

(ii) An amended return or claim for refund or credit where the amended return or claim for refund or credit was filed within 120 days of the taxpayer receiving a written notice of the examination of, or a written challenge to the original tax return.

(3) A practitioner may charge a contingent fee for services rendered in connection with a claim for credit or refund filed solely in connection with the determination of statutory interest or penalties assessed by the Internal Revenue Service.

(4) A practitioner may charge a contingent fee for services rendered in connection with any judicial proceeding arising under the Internal Revenue Code.

(c) Definitions. For purposes of this section--

(1) Contingent fee is any fee that is based, in whole or in part, on whether or not a position taken on a tax return or other filing avoids challenge by the Internal Revenue Service or is sustained either by the Internal Revenue Service or in litigation. A contingent fee includes a fee that is based on a percentage of the refund reported on a return, that is based on a percentage of the taxes saved, or that otherwise depends on the specific result attained. A contingent fee also includes any fee arrangement in which the practitioner will reimburse the client for all or a portion of the client's fee in the event that a position taken on a tax return or other filing is challenged by the Internal Revenue Service or is not sustained, whether pursuant to an indemnity agreement, a guarantee, rescission rights, or any other arrangement with a similar effect.

(2) Matter before the Internal Revenue Service includes tax planning and advice, preparing or filing or assisting in preparing or filing returns or claims for refund or credit, and all matters connected with a presentation to the Internal Revenue Service or any of its officers or employees relating to a taxpayer's rights, privileges, or liabilities under laws or regulations administered by the Internal Revenue Service. Such presentations include, but are not limited to, preparing and filing documents, corresponding and communicating with the Internal Revenue Service, rendering written advice with respect to any entity, transaction, plan or arrangement, and representing a client at conferences, hearings, and meetings.

I'd just like your advice about whether I can indeed charge a contingent fee in this case. How do you read this rule?

Here is the rubric I give to students for peer grading of this assignment:

SMOKIN' SAM PART ONE FEEDBACK

The issues students should identify and resolve include:

1. Does Circular 230 apply? (Yes, this is a "matter before the IRS" under § 10.27(b)(2).)\	I	R	A
2. Is this a contingent fee? (Yes, a contingent fee includes "any fee arrangement in which the practitioner will reimburse the client . . . in the event that a position taken on a tax return . . is challenged by the Internal Revenue Service." § 10.27(b)(1).)	I	R	A
3. Is this permitted by Circular 230? (No, contingent fees are prohibited by § 10.27(b)(1))	I	R	A
4. Do any of the exceptions of § 10.27(b)(2)-(4) apply? (No, this is likely not an examination, challenge, or judicial proceeding)	I	R	A
5. Is this an unconscionable fee under § 10.27(a)? (Students should define conscionability and argue the conscionability factors: procedural and substantive fairness. Students should at a minimum examine the hourly rate as a factor in determining unreasonableness)	I	R	A
6. Does Rule 1.5 apply here? (Students should discuss how the standards of reasonableness under Rule 1.5 and conscionability under Circular 230 compare, recognizing that Rule 1.5 probably establishes a somewhat stricter standard but that both conscionability and reasonableness are likely to involve similar factors. Students should recognize that federal law would preempt state regulation on the question of which standard should apply.)	I	R	A

I = Recognized **Issue**

R = Accurately quoted or paraphrased and explained **Rule** (including, for example, definitions of terms, purposes, or relationships to other rules)

A = **Applied** the rule to the facts, using details of facts where relevant and explaining reasoning in terms of language and policies of the rules. Noted any **ambiguities** in facts and **alternative analysis** where facts or application of law is subject to reasonable **argument.**

6. Billing Practices Review

(Preliminary Problem, page 131, and Sections 7.3 and 7.4, pages 138-144; Outcomes 7-a and 7-b)

While all of the billing practices in the preliminary problem are identified as unethical, students will need to review precisely why that is so. Hypotheticals 1-3 are based on ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 93-379 (Dec. 6, 1993), where the committee suggests that "it is helpful to consider these questions, not from the perspective of what a client could be forced to pay, but rather from the perspective of what the lawyer actually earned…. Rather than looking to profit from the fortuity of coincidental scheduling, the desire to get work done rather than watch a movie, or the luck of being asked the identical question twice, the lawyer who has agreed to bill solely on the basis of time spent is obliged to pass the benefits of these economies on to the client." I often challenge the students to explain to their client why this is a fair bill. Students will sometimes come up with cryptic or general statements they suggest should be put in a fee agreement as a solution. I ask them how the client is likely to feel if they find out the particulars of the attorney's behavior and then are told "you agreed to this." Most students can see this situation through the eyes of a client and, having done so, can understand why these practices are not ethical. Those that cannot should be reminded that these are not only violations of Rule 1.5 but could rise to the level of fraud.

Problem 4 invites the students to decide how much rounding up is too much. As technology more easily permits attorneys to track their time to the minute, rounding up is less and less justifiable in a time-based billing practice. One can argue that rounding up to the nearest tenth of an hour (6-minute-increments) may be justified on the basis that interruptions cost more than just their actual time because of the cost of distractions. Few would agree that this same rationale would make rounding up to the nearest quarter-hour reasonable. In a Kansas case, lawyer Larry L. Myers admitted he regularly rounded three-fourths of an hour of work up to a full hour for billing purposes and was reprimanded for that practice (among other misconduct). *In the matter of Myers*, No. 95,132 (Kan. Feb. 3, 2006). A federal court in Kansas, a year after this case restated that point in disallowing 10.5 minutes in every one of 169 phone calls for which a law firm billed as having taken 15 minutes:

> The relative inaccuracy of quarter-hour billing benefits lawyers by allowing them to round up their time. Especially given the fact that quarter-hour billing conventions are largely obsolete, counsel who use such a method of timekeeping bear a heavy burden of showing that the claimed hours are an accurate representation of counsel's true hours.

Glover v. Heart of America Management Co., No. Civ.A. 98-2125-KHV (May 5, 1999).

A federal court in the Northern District of Illinois found otherwise in a challenge to the quarter-hour billing increment: "We do not think such billing is inappropriate and will not force a firm to change its established billing procedure." *Herrejon v. Appetizers And Inc*. No. 97 C 5149 (Feb. 22, 1999).

Problem 5 is a straightforward violation of Rule 1.5's prohibition on using contingent fees in divorce actions. See Questions and answer 6 in the "Twenty Questions" section for more guidance on reviewing this problem.

Problem 6 is worth reviewing simply to go over trust accounting practice with the students. I review the basic rules with the students, not because they are very difficult, but to emphasize their importance. I walk the students through the state bar association trust accounting handbook (your jurisdiction likely has a similar publication or website) to emphasize that"

- They must have a trust account if they ever have money that doesn't belong to them.
- They must segregate their own money, with the client or third party money in the trust account and their own money in their office account.
- They must disburse their fees as earned—promptly deliver funds or property they are entitled to receive (except as otherwise permitted by rule, law or contract).
- They must keep advances for fees in the trust account until earned.

I also remind them of some basic management guidelines:

Keep separate ledgers. In addition to the account journal (or general ledger) that has the running balance of how much money is in the trust account, create a ledger for each client. Also, create a ledger to record any administrative costs used to cover bank charges.

Don't disburse a check until the deposited funds have cleared. Be diligent, but don't let a client rush you. (Don't write postdated disbursement checks.) When you write disbursement checks, take a moment to add them up and compare against the client's balance in the trust account. Make sure there are funds available to cover the checks. Reconcile your client trust account monthly, regardless of how boring the task seems. Compare your monthly bank statement to the cancelled checks; the canceled checks to the copies you made before they left your office; the checks to the account journal; and the account journal to the client ledgers. Everything should match.

Never pay a client with cash; always have a check as a record. Do not use an ATM card to withdraw money, and never use a deposit ticket to get "cash back." Even a wire transfer isn't a good idea.

Have a good audit trail. In addition to the account statement and any canceled checks, keep a monthly folder with the following: copies of all checks deposited to or written on the account and copies of all deposit slips (your own copies--don't rely on the bank); copies of all disbursement statements or agreements signed by your clients and fulfilled that month; and a copy of your account journal (or a screen print from your computer) showing the account transactions for that month.

I also review the rules under 1.15(c) regarding situations in which both the attorney and others claim an interest in funds or property. I remind the students that the rules require that

- The disputed funds must be kept separate until there is an accounting and severance of interest.
- If a dispute regards interests in only a portion of funds, that portion must kept separate until resolution but the undisputed portion should be promptly distributed.
- They may not withhold funds to coerce the client.
- They may refuse to surrender property if they have a duty under the law to protect a third party's claims to funds or property.
- They should have contract with the client concerning the manner in which funds to be dispersed.

Again, these are not terribly complicated rules but given the risks of error, I feel compelled to take class time to review them.

7. Closure: Tying to Practice

Ask students to identify the type of practice they hope to enter and think about the way in which they will be paid for their work and the biggest ethical challenge presented by that method of earning a living as a lawyer. You can call on student or identify areas of practice and ask for volunteers to report. Two or three of these reports is generally sufficient to bring the class back to the larger picture of the critical role of fees to in ethical practice.

Chapter Eight: Communication and Authority

For a chapter that addresses the most common source of client complaints (failure to communicate) against attorneys, I have found students to be particularly resistant to the materials. Perhaps it is the uncertainty of the standards, perhaps the discomfort with the whole concept of communicating with clients. In any case, I would appreciate any suggestions you have on improving the instruction of these topics.

Outcomes, Assessments, and Assignments

Outcome 8-a: Reading and Analyzing Lawyer Regulation

Students should be able to identify whether a decision is one for the attorney, the client, or is one in which the law provides uncertain allocation of authority; identify the type and degree of communication necessary for different decisions in a representation; and articulate the policy tensions inherent in laws defining the attorney's duty to counsel a client regarding matters outside the scope of representation.

Reading and Problem Assignment:

Chapter Eight. In particular, prepare the preliminary problem on pages 153-54.

I use this problem to review the basics of agency doctrine and the importance of crystal clear allocations of authority regarding settlement.

Assessment:

The quiz suggested in classroom learning activity 3 below can be used for basic assessment of understanding. On the final exam, I test to insure that the students understand the basics of authority to settle and the difference between power and authority.

Outcome 8-b: Communication Skills and Formation of Professional Identity

Student should be able to articulate their conception of what constitutes an ethical and effective relationship between attorney and client regarding decisions and be able to explain that to a client.

Reading Assignment:

Section 8.4 of Chapter 8 (pages 164-66).

I ask students to choose the model of the attorney-client relationship that they think will best serve the clients in their intended area of practice and provide a concrete example of how that model would affect their communication and decision-making in practice

Because many students enjoy lawyer movies, some students have enjoyed the reflective practice assignment on page 168, watching a movie and describing the relationship between attorney and client in the movie in terms of the models discussed in the text. Professor Clark Cunningham makes great use of films to teach about client communication. If you are especially interested in expanding your use of movie clips for teaching, I urge you to contact him at the National Institute for Teaching Ethics and Professionalism.

Assessment:

There are several levels at which you can assess this objective. At the most basic is the ability of students to describe different models of allocation of authority in general and abstract terms. A greater degree of mastery is required for students to be able to recognize one or another model in action. An even higher degree of mastery would be demonstrated by the student who is able to generate their own concrete examples (rather than abstract descriptions) of how their model would affect decision-making and communication. At the end of the semester, the ability of students to recognize the fundamental nature of this decision will be apparent from any question that asks them to counsel a client.

Outcome 8-c: Researching Issues in Professional Responsibility ⓘ

> Students should be able to recognize that substantive legal standards outside the rules of professional conduct may constrain the attorney in advising or assisting a client and be able to locate those standards through research. They should be able to use the Restatement (Third) of the Law Governing Lawyers as a research tool.

Research Assignment:

States vary dramatically in the extent to which they find that the mere fact a client has hired an attorney gives that attorney apparent authority to settle their client's case. I ask students to research this question with the following questions:

1. Which section of the Restatement addresses the issue of an attorney's apparent authority to settle a client case?
2. Find the most recent case from our jurisdiction addressing this question, describe the court's position on the attorney's apparent authority, and indicate how you found that case.

Assessment:

Obviously to assess the student's research skills on this question you will need to do the research yourself. By restricting the research prompt to "the most recent case" you have restricted the answer to a particular case, which makes efficient assessment of student skill easier. Our research librarians are always happy to help devise these and other research exercises.

The key scoring points for this exercise are:

1. Did the student locate § 27 as the appropriate section of the Restatement addressing apparent authority?
2. Did the student identify the most recent case relating to apparent authority in our jurisdiction?
3. Did the student provide the citation to that case?
4. Did the student explain the research method used to locate the case?

As of the text date, the most recent cases citing the Restatement section are

Emmanouil v. Roggio, No. 11-2148, (3d Cir. Sept. 24, 2012) *and Gomez v. Jones-Wilson*, 294 P.3d 1269, 2013 NMCA 7 (N.M. Ct. App. 2012).

Suggested Classroom Learning Activities

1. Set Up: Setting the Scene

One way to begin the discussion of Rule 1.2 is to acknowledge up front the ambiguity and tensions in the rule and give students a context in which to see those. Here is my mini-lecture, using a trailer from A Civil Action, to set the scene:

Rule 1.2 is one of the most difficult but important rules in the whole book. It addresses, among other things, the essence of the attorney client relationship. Some parts of the rule are very curious—consider Rule 1.2(b)—your representation doesn't mean you agree with your client. What kind of a rule is that?? It's really a reminder to yourself and to the public that you are not morally accountable for your client's decisions. But should we be? There is an entire body of literature about this question of moral philosophy.

At an operational level, all of this begins with the process by which you and your client make decisions about the representation. What do you get to decide and what does your client decide? Rule 1.2(a) and the comments to the rule give us some very limited guidance on that question. For many attorneys, the essence of the rule is this: attorneys get to decide means and

clients get to decide outcomes. But we know that the line between means and outcome isn't so clear. How many of you have seen "A Civil Action" with John Travolta. Here's a trailer—www.youtube.com/watch?v=fHRXGQhpib8.

So the attorney strongly identifies with his clients—perhaps over identifies—and in the end, he gets a boatload of money for them, but what does his client want? What was the objective of the representation? An apology. If that's the outcome, how does that affect the means? How does the attorney's own ego and financial needs affect the decision about what the outcome might be?

And how do you handle conflict? It's important to read Rule 1.2 along with Rule 1.4. Consider Rule 1.4(a)(2) the client gets to decide objectives, but you must reasonably consults with the client about means. The comment suggests that, often that consultation has to be before action. So if you consult and the client objects, then what? Comment 2 to Rule 1.2 says that clients normally defer, but I'm not sure that is true of all clients. The comment says that "other law may be applicable." The Restatement tells us that the "other law" includes the law of agency. It suggests that, in the case of conflict, attorneys are agents and are bound to their principal's direction unless that direction would violate the law.

Today we will try to find some clear lines in the allocation of authority between attorney and client and, more importantly, we will consider the default position you might take when you are facing the grey areas.

2. Problem Discussions

(Section 8.2 and 8.3, pages 154-164; Test Your Understanding, page 169, Outcome 8-a)

One choice in this class is how deeply you wish to go into the doctrines of actual and apparent authority. Because in our school, this concept, and its application to the attorney-client relationship, is covered thoroughly in the required business organizations course, I tend to merely mention the vocabulary to refresh the student's recollection.

However, if you wish to emphasize the authority concept, I strongly encourage assigning the research exercise, since this concept is one that is best understood by having many examples and students will make the concept their own through research of your own state's laws. For more examples, you may wish to consult the annotation on this topic. Eunice A. Eichelberger, Annotation: *Authority of Attorney to Compromise Action—Modern Cases*, 90 A.L.R.4TH 326 (originally published in 1991).

The chapter provides several discrete problems which you can use for discussion in class. Be sure to remind the students, however, as the text points out in the bottom of page 159, that the

question of attorney agency authority is one that depends on state law and states vary in their interpretation of this law. The preliminary problem provides an excellent example of a close call on both actual and apparent authority. The problem is based on *Caballero v. Wikse*, 92 P.3d 1076 (Idaho 2004), where the court concluded that there was just enough evidence to find actual authority had been conferred on the attorney to settle the case. Asking the students to explain why the rule should be interpreted to extend authority in this type of case will help them to understand the policy tensions in this area, but they are still likely to be uncomfortable with the uncertainty of the law in problems such as this.

The "Test your understanding" problems on page 169 emphasize the challenges of communicating with clients when they would wish an attorney to use legal tactics that many attorneys would find objectionable.

Problem 2 addressed the use of children as a weapon in negotiating a custody and child support dispute. The problem references the American Academy of Matrimonial Laywer's Bounds of Advocacy, which provide in Goal 6.2 that "An attorney should not permit a client to contest child custody, contact or access for either financial leverage or vindictiveness." This is a good example of how non-binding ethical guidelines can support attorneys in higher standards of practice than the floor of disciplinary rules and law. Many matrimonial attorneys include the bounds in their representation agreement and discuss their approach with the clients. In comments to a related Goal related to resisting client demands for repeated psychological evaluations, the Bounds suggest that, "In most cases, the lawyer's explanation of the benefits of therapy and the harm in involving the child unnecessarily in the divorce and obtaining repeated evaluations, coupled with the parent's concern for the child's welfare, should be sufficient to obtain the client's consent to the lawyer's adherence to this Goal."

Problem 3 addresses the client who insists that the attorney include a provision of doubtful enforceability in a contract. Students need to begin with the clear situations and work toward the middle. Obviously an attorney may not agree to draft a contract with a provision that would be criminal or fraudulent, as that would violate Rule 1.2(d). However, it is not at all clear that 1.2 would prohibit an attorney's inclusion of a provision that is invalid or unenforceable. The Proposed Final Draft of Rule 1.2(d) would have explicitly prohibited drafting agreement provisions that "the lawyer knows or reasonably should know are legally prohibited." However that provision was deleted in the House of Delegates in adopting the rules in 1983. Ethics 2000 did not recommend including the language in the revisions to the rules.

Some scholars have argued that an attorney who intentionally drafts a contract with a clause the lawyer knows is invalid is guilty of dishonest or fraudulent conduct in violation of Rule 8.4. *Paul D. Carrington, Unconscionable Lawyers,* 19 GA. ST. U. L. REV. 361, 379-84 (2002) and *Christina L. Kunz, The Ethics of Invalid and "Iffy" Contract Clauses,* 40 LOY. L.A.

L. REV. 487 (2006), however there is no case law to indicate that courts agree with this interpretation. This is an excellent problem for students to think about how their own personal ethical standards would guide their decision-making and what factual circumstances would influence their decisions.

You can use this problem to preview some of the materials in the litigation ethics chapter. This problem raises an interesting questions of how the standards for attorneys in transactions differs from the standards for attorneys in litigation. So, for example, an attorney may make legal arguments based on a good faith argument for the extension, modification or reversal of existing law. An attorney may bring a time-barred action and hope the other side will not raise the statute of limitations defense. *Gieringer v. Silverman*, 731 F.2d 1272, 1281 (7th Cir. 1984). Even though contract drafting is not subject to the same adversarial testing, it appears that these same standards apply to transactional attorneys.

3. Quiz

(Section 8.2 and 8.3, pages 154-164, Outcome 8-a)

One way to check student understanding of the materials in this chapter is to use a short quiz. If you have audience response systems, this can be especially effective. I distribute the following quiz to the students before class and we go over the answers in class to help clarify the clear lines:

QUESTION 1: Linda Lawyer filed suit on behalf of Client against client's employer, claiming wrongful discharge and sex discrimination. Employer's attorney filed an answer, and also filed a noncompulsory counterclaim against Client for trade secrets. Although there is a tolling issue, Lawyer is thinking of pleading statute of limitations defense to the counterclaim; yet she would prefer to meet the attack on the merits because, in her tactical judgment, she believes that this approach would ultimately be stronger. She believes her client might also wish to meet the issue on the merits, rather than have the question of her honesty unaddressed.

Is it proper for Lawyer to waive the statute of limitations defense when answering the counterclaim?

A. No, because it is incompetent for a lawyer to waive a statute of limitations defense and a client may not consent to a lawyer's incompetence
B. No, because she would be prejudicing her client, who may not waive this prejudice.
C. Yes, without the consent or direction of client, if Lawyer, in her best tactical judgment regarding the means to answer this counterclaim, believes that she should waive the defense.

D. Yes, if the client had first made an informed decision to waive the statute of limitations defense.

The correct answer is D. A and B are wrong because a client can waive a defense, even if it materially prejudices their case, and the attorney will not be disciplined for complying with the client's request so long as the client has made an informed decision (see Rule 1.4(b) and 1.2(a)). C is incorrect because defenses in general and certainly defenses that win the entire case are not considered a "means" but rather part of the allocation of decisionmaking to the client. See Va. State Bar Ethics Opinion 1816 (8/17/05)

QUESTION 2: Attorney has agreed to represent Plaintiff in a personal injury action on a contingent fee basis. The entire fee arrangement is in writing including the following clause: "To assure that Plaintiff does not settle for too low an amount (thereby depriving Attorney of a reasonable contingent fee), no settlement shall be accepted unless agreed to in writing by both Attorney and Plaintiff." Is Attorney subject to discipline?

A. No, because the limitation on settlement is intended to assure Attorney a reasonable fee.

B. Yes, because Attorney may not deprive Plaintiff of the right to decide whether to settle a case.

The correct answer is B—Rule 1.2 makes it clear that the client has the right to settle. That's not to say that a client can't delegate the authority to settle to the attorney, but the right to make the ultimate choice as to settlement cannot be taken away. Do keep in mind as a substantive matter that an attorney may bind a client to a settlement they don't want. This is another one of those dilemmas where an attorney has power but not authority.

QUESTION 3: You are defending client in a personal injury action. Client has $100,000 of insurance coverage. Yesterday, you met with your client to prepare for settlement negotiations that you plan to initiate next week. You explained the strengths and weaknesses of her case and the advantages and disadvantages of settlement. She told you that she was happy to have you negotiate and her behalf and that you should settle her case for any amount within her insurance limits. Today, plaintiff's attorney calls unexpectedly and offers to settle for $90,000, but says that the offer is open only for 24 hours. You believe this is a great settlement offer; however, your client is out of town and cannot be reached. You accept the offer but when client is presented with it, but she says she does not want this settlement. Which statement is most correct?

A. A client cannot consent in advance to a settlement because they cannot know the exact terms; therefore, you are subject to discipline for exceeding your authority and the client will not be bound to the settlement.

B. Because you did not have the client's authorization in writing, you did not have authority to accept the settlement; therefore, the client will not be bound to the

settlement and you will be subject to discipline for attempting to accept it.

C. Because the client's authorization was not in writing, you will be subject to discipline; however, the settlement will be binding on the client because you had apparent authority to settle.
D. Because you had the client's express authority, you will not be subject to discipline, but the settlement does not bind the client until she ratifies the agreement.
E. Because you had the client's express authority, the settlement is binding on the client and you will not be subject to discipline.

The correct answer is E. While either B or C may be tempting as a matter of best practice and because students sometimes conflate "express" with "written" but oral express delegations of authority are enforceable. The fact that the offer came so close in time after the discussion with the client makes the argument in A unconvincing, though it might have more strength if a significant period of time had passed between authorization and settlement or if the attorney had been able to contact the client. Answer D confuses the entire notion of how agency authority works. If an attorney has authority, they can bind the client. Ratification is only necessary when an attorney acts without authority, and the client can then approve the exercise after the fact. In other words, delegation is before the fact; ratification is after the fact. If you have delegation, you don't need ratification.

4. Charting the Rules

(Section 8.2 and 8.3, Questions on pages 163 and 169; Outcome 8-a)

The text asks students to chart the rules regarding communication and allocation of authority in two different places. Page 163 asks students to chart Rule 1.4. Here is one example of how they might do so:

In what way must attorney communicate with the client?	About what?	How and When?
Inform	Decisions or circumstances to which client's informed consent is necessary	Promptly
Consult	Means to accomplish client's objectives	Reasonably
Explain	A matter (about which the client must make informed decisions)	Reasonably necessary
Respond	To client's reasonable request for information	Promptly

After completing the chart and thinking about it, the students should see that there is very little difference between "informing" "consulting" and "explaining" (indeed, before the model rules provided a definition of informed consent, the term "consult" was widely interpreted to mean "obtain informed consent." Rather they should see that the rule assumes away the question of which decisions the client must make, and therefore must have information ahead of time to do so, and which decisions are the attorneys, meaning the client need not have as much information or in advance of the attorney taking action. I find the "timing" language of the rules in combination with the subject matter to be the best clue that Rule 1.4 is only minimally reinforcing the means/ends distinction of Rule 1.2.

The "imagine" question in the reading the rules guide on pages 163-64 is especially important for students to think about and discuss. Why don't attorneys want to consult with clients as they should? Some answers they might provide include:

- Attorneys don't understand their duty of communication.
- Attorneys aren't good at interpersonal communication.
- Attorneys don't want to take the time because it's difficult to charge for consultations.
- Attorneys get too busy.
- Attorneys aren't organized.

A second graphing exercise (Question 1 on page 169) asks students to provide examples of decisions that belong to the attorney or the client. This is also an excellent tool for helping students see the relationships between Rules 1.2, 1.4, and the law of agency. They should understand that there are very few decisions that clearly are the sole authority of either the client or the attorney. The client has the decisions about firing the attorney, how much money to spend, terminating litigation (through settlement or dismissal), and testifying (in a criminal case). The attorney has almost no clear authority to act except the negative authority to refrain from violating the law or assisting in violations. Almost any other example of an attorney's authority could be subject to constraints by the client. A common recent example is the tendency of corporate clients to increasingly demand (by refusing to pay for) that their law firms not use computerized legal research or assign new associates to cases. Students should conclude that it is risky to simply assume that their concept of the line between means and objectives will be the same as the clients.

5. Discussion of Rule 1.2(b)

(Section 8.5, Outcome 8-b)

Section 8.5 of the chapter walks the students through Rule 1.2(b). It asks them to consider when they might cite the rule. I use the rule as an opportunity to discuss whether attorneys should identify with their clients. Students who have strong motivations to represent a particular

class of clients often need to be reminded of the importance of maintaining professional boundaries and avoiding over-identification with clients lest this interfere with their *independent* professional judgment and can risk vicarious trauma when working with certain clients.

In terms of judicial use of the rule, there has been very little. One example is *LaBrake v. State*, 152 P.3d 474 (Alaska Ct. App. 2007), which is an excellent example of the use of the rule to justify representation of an unpopular client and a good situation to circle back around to Rule 1.16 withdrawal rules as well. The case was an ineffective assistance of counsel claim in which the defense attorney was representing a defendant in a second-degree sexual abuse of a minor case. The attorney had told the client that, as the father of a teenaged daughter, he was personally strongly opposed to the sexual abuse of children. However, the court rejected this as evidence sufficient to overcome the presumption that the attorney was not prejudiced against the client. The court concluded that "Lawyers are trained and expected to represent people whose conduct may be questionable, and whose views on social and moral matters may differ significantly from the lawyer's" citing Rule 1.2(b). The court emphasized that personal difficulties or animosity between a defense attorney and a defendant does not constitute a reason for removing the attorney from the case unless "the attorney-client relationship has deteriorated to the point where the attorney is incapable of effective communication with the defendant or [the attorney is incapable of] objective decision-making about the case." *Id.* at 483.

6. Models of the Attorney-Client Relationship Card Game
(Section 8.4; Outcome 8-b)

If you want to encourage discussion among the students about the models of the attorney-client relationship, I have used the following "card game" in the past (I've now passed the game onto a colleague to use in her alternative dispute resolution class, so I no longer use it). The activity takes quite a bit of time (as much as 20 minutes) though you can shorten that by placing time limits for students to make their choices and by limiting the number of times you have students increase their groups. The exercise works better if you have a classroom in which students can freely move about. Print off enough copies the following quotes (preferably on cards stock) so you have three times the number of students in the class.

The effective practice of law rests on power and control. A good lawyer is one who dominates a situation. An attorney who tries to convince a client that the client's goals or motives are personally (not legally) unwise or unjust will be out of business.

A lawyer's first duty to their clients is to give them the broadest range of advice regarding their actions, even if that advice requires consideration of non-legal matters.

Since an attorney cannot divorce him or herself from personal values, the attorney must engage a client in a discussion of those values when they conflict with the client.

Provided the end sought is not illegal, the lawyer is, in essence, an amoral technician whose peculiar skills and knowledge in respect to the law are available to those with whom the relationship of client is established.

People do not hire attorneys for their practical or moral wisdom. When someone hires an attorney, he or she wants advice only on the technicalities of the law.

Clients hire their attorneys to help the client accomplish their goals.

Only a client knows what they really want: Lawyers should not be second guessing a client's motives or goals. A lawyer's job is simply to help a client reach those goals.

A lawyer must never forget that he is the master. He is not there to do the client's bidding.

The lawyer must serve clients' legal needs as the lawyer sees them not as the client sees them.

An attorney who simply follows a client's directions, even if the attorney disagrees with the personal (not legal) wisdom or justice of those directions, will be out of business.

A lawyer is not responsible for the consequences of his or her work, so long as they do not flow from his or her unlawful acts or from incompetence.

Counsel must be the manager of the law suit. If tactical decisions are to be made by the defendant he is likely to do himself more harm than good.

One of the surest ways for counsel to lose a lawsuit is to permit his client to run the trial.

The effective practice of law rests on empowering clients.

A good lawyer is one who facilitates communication and problem solving.

Lawyers should never give advice to clients about moral, psychological, or economic decisions because lawyers are not clergy, psychologists or financial experts

One's personal values are an inappropriate input to decision-making as a lawyer.

a. Distribute three cards to each student. Tell the students to read the cards and determine whether they can defend without reservation the statements on all three cards. If not, they should try to trade cards with another student.
b. Instruct students to pair up with another student and choose the two cards out of their six that they agree they can defend without reservation
c. Instruct students to pair up with another pair of students and choose the two cards the four of them can defend without reservation and prioritize them.
d. Have groups report which of the statements they agreed on.

6. Closure—Practicing Communicating about Scope with Clients
(Skill 8-A, page 164; Outcome 8-b)

An excellent way to help students see the difference between directive, collaborative, and instrumental attorneys (or whatever labels you prefer) is for students to practice counseling a client on a matter in which the attorney and client disagree. I have used a scenario in which the client wants the attorney to do something unethical and the attorney needs to respond. You could use the following problem.

You represent Paula Pedestrian in a suit against Darren Driver arising out of an accident in which Darren was driving his car and hit Paula while she was crossing the street. In negotiating a discovery schedule, Darren's attorney Arnold called you and asked to postpone scheduled depositions for three weeks since they were scheduled during the time Arnold's wife was due to give birth. Consenting to this extension would not prejudice Paula. However you know that Paula wants this case to be pushed as fast and aggressively as possible and that she would be very upset if she learned that you had given the other side any "breaks."

Can you agree to the extension without first informing Paula?

If you decide to talk to Paula first, model the conversation you would have with her about this issue.

First, make sure the students understand the legal boundaries here. Under the rules of professional conduct, whether to grant a continuance is within the attorney's discretion as to means. The duty of diligence does not require denying reasonable requests for continuance. (See Comment 1 to Rule 1.3 "A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.")

Indeed the use of offensive tactics, even if directed by the attorney is prohibited by the rules (see 4.4(a)). So even if the client directed the attorney to be unreasonable, the attorney could not follow that direction. However, the attorney must "consult" with the client about the means chosen. However, this directive does not mean that the attorney must consult in order to obtain authority to act on means because Rule 1.2 provides that a "lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation."

Under the law of agency, this would be the easiest situation in which to infer an apparent agency to determine scheduling, given the context of the rules. Students should recall, however, how risky it is to rely on apparent authority and should have already had a general discussion with the client about allocation of authority to make decisions regarding scheduling and other procedural matters. They should also recognize that, if the lawyer has already been directed by the client to give no extensions, he could not go ahead and grant the extension without the client's consent, because the rules of agency don't give the attorney the authority to override a client's direct order. Rather than do what the client has said not to do, the attorney's only option is to withdraw when he and the client have come to an impasse. As a matter of agency law, the attorney would be subject to liability for violating his fiduciary duty to his client if he granted the extension over his client's direction not to do so (though damages would be difficult to establish).

Doing a little role playing to demonstrate the three approaches to communication on this issue would illuminate the differences in approach very nicely. An instrumental attorney would ask the client and would follow the client's directions to expedite the proceeding as much as would be consistent with the rules. Even under this approach, the attorney could not deny the extension, but might press for the earliest date possible for depositions or press the attorney to secure co-counsel. A directive attorney would have made it clear from the beginning of the representation that the attorney would be in charge of procedural and tactical choices and might not even speak to the attorney about the extension until after having granted it. A collaborative attorney would try to work with the client to help the client understand the attorney's ethical obligations but would also try to find ways to advance the client's legitimate goals as well.

Choose a student to play the role of client who can play the role realistically but present a client who is bent on revenge. If students conclude they must withdraw, be sure to bring the students' attention to the intersection of Rules 1.2, 1.4, and 1.16 by asking for the specific authority in 1.16 that would permit withdrawal.

Unit Two Review & Transition to Unit Three

If you do not want to take any class time to wrap up this section, you may simply ask students to revisit the Unit Two pre-test. I tell the students that they should be able to fill in the blanks on all the questions without reference to their notes. Here is one approach to filling in the blanks:

1. You have an attorney-client relationship with someone
   - if you have agreed to represent them
   - or if you are appointed to represent them
   - or if you or your agent has acted in such a way to induce a client's belief that you represent them or reliance on your advice
   - but not if you have expressly disclaimed the relationship so that the client's belief that you represent them or reliance on your advice is unreasonable.

2. An attorney must accept representation of a client if a court has appointed him
   - unless the attorney is excused from that appointment for good cause.

3. An attorney must withdraw from representing a client if
   - the representation would violate the rules, or the attorney is fired or unfit to practice
   - and may withdraw from representing a client if there would not be a material adverse effect or there is good cause unless the court has ordered the attorney to continue.

4. The most common source of regulation of attorney competence is malpractice.

5. An attorney must comply with a client's directions regarding any aspect of the representation unless the client is directing the attorney to violate the rules or law.

6. Informed consent means a process of communicating with a client the alternatives, advantages, and disadvantages of any given choice.

7. Attorney's fees are reasonable and enforceable if the court finds them reasonable under the non-exclusive multi-factor test of Rule 1.5 (with the most important factors usually being client informed consent and proportionality to work, results, and market).

Client Engagement Letter Issue Spotting

The issue spotting contract draft exercise is an excellent review problem to assign for out-of-class review. It takes very little time to grade, since all students need to do is list the line number and provide a brief label or explanation of the violation. I return the following grading

key to the students after scoring their assignments:

Grading Key

Line #s	Risks	Rule or Doctrine
1, passim	"& Associates"; Use of "we" throughout, implies law firm but she's solo—misleading.	8.4(c)
3/8/22	Is BGF practicing law without a license? Her office is in Kansas but she's going to sue in Missouri.	5.5
17-18/38	Guarantees in the contract set higher standard of care than the rules—malpractice risk ("hyperbolic flim-flam").	Malpractice K law
19/87-92	"clarify & confirm"—Last paragraph—looks like she's already agreed to the representation; but requirement to return letter seems like not—ambiguity will be held against the attorney.	Malpractice Agency K law
32	Hiring an expert (generally) or other attorney (specifically) w/o client consent? Likely not something the client can or should delegate to attorney without knowing who the attorney is. Risk of fee splitting too.	1.2(a); 1.4(a)(1); 1.5(e)
36	Paula as the only contact? Risk of UPL and poor supervision.	5.3; 5.5
43-45	Too much delegation to attorney? "sole discretion" on means may be consistent with 1.2 but not with 1.4. Is sending copies really "consulting" on means?	1.2(a); 1.4(a)(2)
47-48	"you agree to cooperate" on issues that client has discretion to decide (e.g. settlement). At best this is vague and unenforceable; at worst, may be overstepping authority of 1.2 and communicating that attorney has the right to make these decisions.	1.2(a); 1.4(b); 8.4(c); K law
52	Does she really have special expertise?	1.1; 8.4(c); malpractice
54	Rounding up to the quarter hour is likely unreasonable.	1.5
56-58	"two or more of us may attend meetings…" May be okay is needed for representation but could be a way of asking client to agree to padding or double billing. Depends on how it gets used.	1.5

49-63	Very vague –presumed fraudulent if challenged.	Agency
59	Changing fee structure in the middle of representation may not be enforceable without more detail and without a writing; likely wouldn't be a basis for good cause withdrawal; see notes below.	Agency K law; 1.4(b); 1.5(b); 1.16(b)
65-67	Sounds like a retainer to me (really difficult to understand whatever it is)—nonrefundable retainers are per se unreasonable.	1.5(a); 1.16(d); Mo ethics op
73-76	This is unethical coercion to collect a fee—can't curtail services to coerce a fee; can't get a client's advance consent to withdrawal (not informed, need court permission if entered appearance).	1.3 cts 1 & 4; 1.4(b); 1.5 ct 5; 1.16(b)(5)
81-83	Fee shifting standard is general an award of "reasonable fees" so charging more is *per se* unreasonable in most cases.	Caselaw; 1.5; 8.4(c)
90	If doesn't agree, still has to pay? Trying to enforce quantum meruit through a fee agreement? Very unclear—seems like overreaching—unenforceable at best.	1.5
99	What general provisions??? Sloppy and likely unenforceable.	1.1; Contract law

Non-issues

40 Some students were concerned by the promise to return phone calls within 24 hours. While it probably would be preferable to say "we will try to return your call within 24 hours" there is in fact nothing unethical about the promise (indeed, if the attorney can honor the promise it is exceedingly ethical) nor practically does it increase risk in any significant measure.

45 Does the client have the right to "originals"? Not of pleadings and the like—couldn't be the rule, since the court gets the "original" and this would totally eliminate the ability to have a paperless office. Only if documents are items of intrinsic value must the attorney preserve and return the "original."

59 Changing the fees during the representation is not per se unethical; problem here is the vagueness of the basis for the fee charges.

> Modification of an existing fee agreement is permissible under the Model Rules, but the lawyer must show that any modification was reasonable under the circumstances at the time of the modification as well as communicated to and accepted by the client. Periodic,

> incremental increases in a lawyer's regular hourly billing rates are generally permissible if such practice is communicated clearly to and accepted by the client at the commencement of the client-lawyer relationship and any periodic increases are reasonable under the circumstances. Modifications sought by a lawyer that change the basic nature of a fee arrangement or significantly increases the lawyer's compensation absent an unanticipated change in circumstances ordinarily will be unreasonable. Changes in fee arrangements that involve a lawyer acquiring an interest in the client's business, real estate, or other nonmonetary property will ordinarily require compliance with Rule 1.8(a).

ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 11-458 (August 11, 2010).

52-52 Charging hourly rate for paralegal—is this sharing fees with a non-lawyer?

> In *Missouri v. Jenkins*, 491 U.S. 274 (1989), the United States Supreme Court held that in setting a reasonable attorney's fee under 28 U.S.C. §1988, a legal fee may include a charge for paralegal services at "market rates" rather than "actual cost" to the attorneys. In its opinion, the Court stated that, in setting recoverable attorney fees, it starts from "the self-evident proposition that the 'reasonable attorney's fee' provided for by statute should compensate the work of paralegals, as well as that of attorneys." Id. at 286. The linchpin of the prohibition seems to be the advance agreement of the lawyer to "split" a fee based on a pre-existing contingent arrangement. *See, e.g.*, *Matter of Struthers*, 877 P.2d 789 (Ariz. 1994) (an agreement to give to nonlaywer all fees resulting from nonlawyer's debt collection activities constitutes improper fee splitting); *Florida Bar v. Shapiro*, 413 So. 2d 1184 (Fla. 1982) (payment of contingent salary to nonlawyer based on total amount of fees generated is improper); State Bar of Montana, Op. 95-0411 (1995) (lawyer paid on contingency basis for debt collection cannot share that fee with a nonlawyer collection agency that worked with lawyer). …
>
> Model Rule 5.4 and DR 3-102(A) and 3-103(A) under the Model Code clearly prohibits fee "splitting" with paralegals, whether characterized as splitting of contingent fees, "forwarding" fees, or other sharing of legal fees. Virtually all guidelines adopted by state bar associations have continued this prohibition in one form or another. … It appears clear that a paralegal may not be compensated on a contingent basis for a particular case or be paid for "signing up" clients for representation. … There is no general prohibition against a lawyer who enjoys a particularly profitable period recognizing the contribution of the paralegal to that profitability

> with a discretionary bonus so long as the bonus is based on the overall success of the firm and not the fees generated from any particular case. See, e.g., Philadelphia Bar Ass'n Prof. Guidance Comm., Op. 2001-7 (law firm may pay nonlawyer employee a bonus if bonus is not tied to fees generated from a particular case or class of cases from a specific client.).

AMERICAN BAR ASSOCIATION STANDING COMMITTEE OF PARALEGALS, ABA GUIDELINES FOR THE UTILIZATION OF PARALEGAL SERVICES, Comments to Guidelines 8 & 9, at 11-12 (2004).

84-85 Many states do not allow retaining liens (in which attorney gets to keep all the files until the client pays) but they may permit judgment liens. These liens give the attorney a lien against settlement or judgment that must be honored by third parties.

The Closing Letter Problem

This problem provides a fairly straightforward review of client authority and ending the attorney-client relationship. Again, this can be used efficiently either in or out of class. Point out to the students that the problem has a typo in that it begins in the third person (Alice Attorney) and then shifts to the second person (Dan has asked you…).

In analyzing the first question about asking for Paul's help, students should recognize that asking for help is exactly what Rule 1.1 contemplates in a situation such as this. Likewise, choosing not to bill for bringing oneself up to a basic level of competence is a good practice, though it would not necessarily be unreasonable for the attorney to have charged for the work, depending on how *basic* the issues were.

However, not charging does not excuse not telling the client about the other attorney's involvement. Engaging another attorney to work on the client's case without the client's knowledge or consent is a violation of Rule 1.4 at a minimum. It is likely also a violation of Rule 1.2, since who represents the client is not really "means" and a arguably a violation of Rule 1.6 (which students haven't studied yet) since it is not clear that this is impliedly authorized to carry out the representation.

An easy way to help students to recognize this is to ask, "What if Paul's advice was all wrong? Who could the client sue for malpractice?" Remind the students that just because the client didn't pay for Paul's work doesn't mean there wasn't an attorney-client relationship.

As to the closing letter, the first paragraph does a beautiful job ending the relationship. The second paragraph undoes all that good work by seeming to create an ongoing relationship.

Ask the students to rewrite the second paragraph (or consider whether to even include it in a closing letter) to avoid the ambiguity.

Multiple Choice Review

The multiple choice review problems are designed for student independent review, especially for those students preparing for the MPRE. I do not review these in class but do remind the students to ask if they have questions.

Unit Three: Confidentiality

I provide the true-false statements as a pre-test with answers here so that students who like to have the big picture first can have an overview of the core topics and most readily confused ideas. I do not address the pre-test in class, since Chapter Nine is a basic overview chapter.

Chapter Nine: Confidentiality, Privilege, and Related Doctrines

For many teachers of Professional Responsibility, the students' difficulty in separating confidentiality and privilege presents one of the biggest challenges in teaching the course doctrine. Moreover, the complexities of the law in this field, especially the many variations among the jurisdictions and the ongoing developments regarding attorney-client privilege, make your decisions regarding coverage critical. I choose a middle ground—addressing both privilege and the ethical duty throughout the unit but continually reminding students that they should consult with their own jurisdiction's authority on the questions.

Outcomes, Assessments, and Assignments

Outcome 9-a: Reading and Analyzing Lawyer Regulation

Students should be able to define and distinguish the major doctrines defining an attorney's obligation not to disclose or use a client's information and identify when these doctrines apply in factual settings.

CALI Assignment:

Because I find that students need as much help in mastering the contents of this chapter as possible, I not only assign the chapter but I also assign the CALI lesson cited on page 206, using the lesson-link feature of CALI so that I can track which questions the students are having difficulty with before the class session. For more on using lesson link, see the guidance on using CALI lessons in Part One of the Teacher's Manual.

Assessment:

The CALI lesson provides an opportunity for students to engage in some self-assessment. The "Test Your Understanding" questions at the end of the chapter are very good for checking student understanding. On final exams, the degree to which students can separate confidentiality and privilege language and rules in their analysis is one of the points I consistently test by providing test questions that raise both issues, usually in the form of an exception or waiver question.

Outcome 9-b: Researching Issues in Professional Responsibility

Students should be able to research issues of the scope of the duty of confidentiality, the attorney-client privilege, and the work-product doctrine.

Research Assignment:

I assign the research guidance (9-A) on page 202 in the text and then ask students to research the following issues in our jurisdiction. Doing so reinforces the students' ability to distinguish privilege and confidentiality and also emphasizes the degree to which answers vary by jurisdiction. I have provided here some general sources you might use to check your students' research. I encourage you to enlist your research librarians in this teaching task as well. Here are my instructions:

1. The very fact that someone has engaged an attorney is confidential information. But what if you are asked to testify regarding whether you represent a particular client. Is your client's identity privileged information under our state's law? Provide a citation to the authority that supports your answer (if you are able to locate an answer) and briefly summarize your research method (tools, queries, results).

2. Has our jurisdiction addressed the issue of whether there is any protection under the work-product doctrine for attorney impressions in documents that are prepared for representation aside from litigation? Provide a citation to any authority you find, briefly summarize the approach taken by our jurisdiction (if you can locate an answer), and briefly summarize your research method (tools, queries, results).

For the first question, students might have found the answer for your state through a variety of routes. It is not uncommon for most of your students today to go first either to Google or to an electronic research service (Westlaw, Lexis-Nexis, or Bloomberg), though neither would be as efficient as a state practice manual. Even with electronic search services, however, students must choose the most efficient method and search query.

For a national perspective on the issue, you may wish to consult the ALR annotations on the subject: R.M. Weddle, Annotation: *Disclosure of Name, Identity, Address, Occupation, or Business of Client as Violation of Attorney-Client Privilege,* 16 A.L.R.3D 1047 (Originally published in 1967) or Diane M. Allen, Annotation: *Attorney's Disclosure, in Federal Proceedings, of Identity of Client as Violating Attorney–Client Privilege,* 84 A.L.R. FED. 852 (Originally published in 1987). Annotations such as this can also be a very effective starting point for student research efforts.

For an excellent recent article providing an overview of the issue, *see* Sande L. Buhai, *Confidentiality of Client Identity,* 2013 PROF. LAW. 195 (2013)(summarizing the general state of the law, outlining the three exceptions to the general rule that identity is not privileged, and suggesting changes in the law).

For the second question, the students have sources from which they can begin their research. The text discussion of this topic on page 200-01 provides students with two good starting points for research: the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS and MOORE'S FEDERAL PRACTICE.

Suggested Classroom Learning Activities

1. Set Up: Discussion of the Logan Case

Discussing the Alton Logan case makes an excellent vehicle for exploring the reasons for and costs of confidentiality. I often play the 60 Minutes episode on the case, which provides a compelling description of the issues. Playing a portion of the interview will provide immediacy to the problem. You can then ask students why the attorneys believed that they had the duty to keep their client's information confidential. This will allow you to preview the categories of exceptions to Rule 1.6 and address any remaining misconceptions. You can then ask what purposes these doctrines serve. Finally, you can ask students to think about what they would do if the duties of confidentiality conflict with what they believe is their moral obligation.

2. Drilling the Basics of Confidentiality

(Chapter 9; Outcome 9-a)

For this and the conflicts overview chapter, I have found a short review of basic questions to be helpful. PowerPoint slides are available on the electronic resources webpage to accompany these questions. Providing students an incomplete outline, perhaps with only the key questions, can help to maintain engagement.

1) Why do we protect confidentiality and why do we have exceptions?
   The duty:
   protects a client's constitutional rights of privacy and protections from self-incrimination.
   encourages and protects trust in individual attorneys.
   limits the attorney's ability to use information to help third parties.
   can be a tool for abuse, thereby undermining the public's trust of the legal system.
   .
2) What are sources of confidentiality obligations?
   Disciplinary rules
   Court rules & statutes
   Court orders
   Contract provisions
   Fiduciary responsibility
   Constitutional law

3) To whom does an attorney owe the duty?
   Clients: whom you agree to represent, who assume you are represented, (1.6) or whom you are appointed to represent (6.2)
   Those who have been clients but are no longer (1.9)
   Those who are contemplating becoming clients (1.18)

4) What information is "confidential" under the rules of professional conduct?
   "Information relating to the representation"

5) What information wouldn't be confidential?
   Generic information that is only tangentially tied to the client or the representation (e.g., general learning)
   No representation contemplated or formed and no expectation of confidentiality
   If an exception applies.
   Emphasize here the "it doesn't matter" list:

   - What form the information is in (e.g., even if based on your own observations).
   - What source the information is from (e.g., even if found in public records) (cf. 1.9 "generally known" exception isn't part of 1.6 in most states).
   - How it was acquired (e.g., even if found by accident).
   - When it was acquired (e.g., even if learned the information before the representation began).
   - Whether attorney or client actually knows the information (e.g., what a paralegal learns is confidential).
   - Whether it is otherwise protected (e.g., even if a court rules that the information must be disclosed because it isn't privileged, the attorney has the ethical duty to continue to keep the information confidential outside that disclosure).
   - What type of attorney you are (e.g., even government attorneys have an ethical duty of confidentiality, usually elaborated in statutes or regulations).

6) How can the duty be breached?
   Disclosure
   Use (remind students that agency law prohibits using a principle's information for personal benefit)

7) What are the remedies for violating Rule 1.6?
   Remember that the remedy for violating Rule 1.6 is discipline. Increasingly rules are used as a basis for private cause of action (despite the Model Rules Preamble's attempt to prevent this).

3. Class Activity: Case Discussion

(Section 9.1, pages 184-92; Outcome 9-a)

One of the ways in which students misunderstand confidentiality is their undue narrowing of the doctrine to only those matters that are "secret" or would qualify as privileged. The *In re Anonymous* case is an excellent vehicle for helping students to understand the breadth and seriousness of confidentiality and the ease with which even simple gossip can breach the duty. The following are some questions and suggestions of the answers you might generate you could use to guide your dialogue.

Q. Why do you think the court kept the identity of the attorney in this case confidential?
A. The sanction was a private reprimand. Anonymous wasn't an evil or incompetent attorney. She'd never had discipline before. She just forgot her duties and confused her role. There but for the grace of God, as they say. The court clearly wanted to publish the opinion to provide guidance to other attorneys but didn't want to bring a great deal of public approbation to this individual attorney (though keeping these matters private today isn't so easy, since the prior proceedings, under the same case number, are available on the internet and those proceedings use the attorney's name).

Q. What was the relationship between Anonymous and AB?
A. AB was an employee of an organization that Anonymous represented. (Remind students that this is one of those common situations of client ambiguity and that Anonymous should have been on her guard. They may also have been friends, which is another situation in which attorneys have to be careful that they aren't inadvertently creating an attorney client relationship.)

Q. How did the attorney learn of the information?
A. From a couple of phone calls from AB.

Q. Why did AB call the attorney the first time?
A. We're not really sure about the first call, but Anonymous says it was personal. (page 189)

Q. The court holds that AB was not, during that first phone call, a prospective client under Rule 1.18. Do you agree? If Anonymous had been a family law attorney would that affect your conclusion?
A. We're not sure what the substance of that conversation was, but it seems likely there was not any request for legal advice or an expectation that AB was asking Anonymous to represent her.

Q. So if AB wasn't a prospective client, does that mean the information from that first phone call wasn't confidential?

A. It wasn't confidential only so long as AB didn't later become a prospective client or client. Remember, information relating to a representation is confidential even if you obtain the information before the representation begins (or in this case, even if you obtain the information before the individual becomes a prospective client).

Q. What about the second call?
A. The second call was for a referral.

Q. Why was AB a 1.18 prospective client when she was only asking for a referral?
A. On the one hand, while she wasn't a prospective client of Anonymous, because she was calling for a referral, she was a prospective client of the firm. On the other hand, giving a referral to an attorney isn't exactly legal advice and that's what she wanted: a referral.

Q. Would it have mattered if AB hadn't hired an attorney in Anonymous's firm?
A. Maybe. Would have made it harder to argue that AB was a Rule 1.9 former client, but it appears from the court's analysis that she still would have been a Rule 1.18 prospective client.

Q. Would it have mattered if the reason AB was calling Anonymous was to make sure that AB's husband wouldn't be able to hire Anonymous?
A. Yes, but that's very difficult to prove. (See note 2 page 191)

Q. Why doesn't it matter that AB had told others about the divorce?
A. Because the choice to share information is the client's choice. Just because the client chooses to share information with others, doesn't mean the attorney can make that same choice. Because the privilege is waived by disclosure, attorneys get confused about this.

Q. But what about the "generally known" exception in 1.9(c)(1)?
A. The court points out (bottom of page 189) that telling some co-workers doesn't mean the information is "generally known"—that standard is much higher than the waiver standard of privilege. Even information that is in the public record isn't necessarily "generally known" (in other words, generally *known* is not the same thing as generally *knowable*). The standard really implies a level of public knowledge that wouldn't ordinarily exist.

Q. Why did Anonymous reveal the information about AB?
A. Gossip? Friendship? Court suggests "personal concern for the client" (page 190). But that's not a reason that's covered by the exceptions to 1.6.

Q. Why did this mistake happen? (refer to the "Top Ten" list from the competence chapter, page 107-09)

A. I suspect this is an "I had no idea" situation. What was she confused about? She confused the narrow standards of privilege in which waiver readily occurs and the broad standards of confidentiality. She may have also been confused about the duty to prospective client. (See note 1, pages 190-91).

It may also have been an "I was only trying to help" situation. If so, what roles was she mixing up? Likely the role of a Friend versus the rule of an Attorney, though some would argue that gossiping about friends, even if it is with the intent to help, is just as unethical.

Q. How do you avoid making this same mistake?
A. Don't gossip about clients.

Q. What if she had been talking with her friends about "one of her clients" without identifying AB—would that violate 1.6?
A. Might have. If her friends could have easily discovered who her client was. Moreover, if she was just gossiping, from an ethical standpoint, shouldn't attorneys refrain from talking about their clients for amusement, even if in hypothetical form? (See note 3, page 191).

Q. What if she had been talking with her friends about the legal effect of a prior protective order in a divorce action without reference to any representation or client?
A. This is less likely to violate confidentiality, since it is a pure legal discussion and it's more likely to be motivated by improving practice and knowledge, rather than just entertaining war stories.

Q. If AB wanted to sue Anonymous for this violation, what would she claim? What would be her damages?
A. Not violation of the rules—there is not a private right of action for violation of the rules. More likely breach of fiduciary duty. Damages could be reputational loss, emotional distress, and certainly fee forfeiture if she had paid fees to Anonymous.

4. Comparing Protections in Litigation
(Sections 9.1-9.3; Outcome 9-a)

How deeply you decide to go into privilege and work product will depend in part on how those issues are taught in your law school. Our required Evidence course addresses attorney-client privilege only briefly, so I feel compelled to address it more fully, whereas our required Civil Procedure course walks the students through work-product protections quite a bit, so I am willing to give that topic less attention. In any case, students need first and foremost to be able to keep these doctrines distinct from the ethical duty of confidentiality and that is the aspect of the reading I most emphasize in class.

First I make sure the students can all recite the elements of the attorney-client evidentiary privilege:

1. Confidential (Be sure to emphasize that this "confidential" doesn't have the same meaning as "confidential" for purposes of the ethical duty. Ask students to explain the difference. If they can adequately identify the expectation of privacy element in privilege as the difference, they are well on their way to keeping the two doctrines distinct.
2. Communication (not facts or information, just communication).
3. Between Attorney & Client
    a. I don't address the Wigmore distinction of communication from the client to the attorney vs. communication from the attorney to the client, as I believe it is a largely historical distinction.
    b. I do emphasize that this is more accurately discussed as "between privileged persons" and call student attention to this discussions in the text on pages 195-196
    c. On the organizational privilege, I emphasize that the communication with an individual in the entity may be privileged even if the person to whom you are speaking is not the one who owns the privilege, an important distinction that students often do not appreciate.
4. For purposes of legal advice

Second, I try to make sure students understand that, while the client owns the privilege and has the right to decide whether to assert or waive it, the attorney is the client's agent and so has the power to assert or waive for client. Students sometimes have difficulty understanding that an attorney may have the *power* to waive the privilege even if the attorney does not have the *right*. We cover this again in the next chapter, but it is worthwhile addressing here as a preliminary matter.

Third, I try to get students to provide examples of when the privilege governs. They easily understand that privilege applies in a judicial proceeding in which the rules of evidence apply, but may not appreciate that statutes extend the protections to administrative investigations.

A simple assessment of student understanding can be accomplished by asking students to categorize documents that might be in an attorney's file as confidential, privileged, or work-product. Here are some examples you might use:

Suppose client comes to you for representation in a case in which client has been sued for unfair competition.

	Duty of Confi-dentiality	Attorney-Client Privilege	Work-Product Protection
Notes of initial interview with client	X	X	X
Client's responses to questionnaire the attorney provided to the client	X	X	X
Notes of interviews with client's employees	X		X
A printout of client's financial records from the client's computer.	X		
Client's federal income tax returns.	X		
Newspaper clippings about client's business	X		

As students categorize these documents, you can help clarify any misunderstandings about the differences among these doctrines.

4. Closure: Test Your Understanding Problems

The incomplete chart on page 205-06 makes an effective minute paper assessment to gauge whether students understand the key rules from the chapter.

	Duty of Confidentiality	Attorney-Client Privilege	Work-Product Protection
What does it protect?	Information relating to the representation	Private communications between attorney and client (or their agents)	Documents prepared in anticipation of litigation
Whom is it designed to protect against whom?	Protects the client from the attorney's misuse or disclosure	Protects the client from compelled disclosures	Protects the attorney and client from opposing parties freeloading
What form of information is protected?	Any form	Communications	Documents
For what purpose must the information have been gained?	Any purpose so long as it now relates to the representation	To secure legal representation or legal advice	To prepare for litigation
When must the information have been gained?	Any time	During consideration of representation or representation	During representation

Problems 1-2 on page 206 are also effective summary assessments:

1. Dan's statements are both confidential and privileged. TRUE

Frank's statements are confidential. TRUE
Frank's statements are privileged. FALSE

2. Can Attorney be subject to discipline for his actions?

Answer c is the correct response. Attorney failed to take reasonable precautions to protect the confidences (a combination of 1.6 and 5.3 applies here).

Chapter Ten: Exceptions to Confidentiality and Privilege Based on Consent and Waiver

I chose the readings in this chapter to explore the many variations on exceptions to the rules of confidentiality, rather than simply teach the Model Rules version. Likewise, I continue to explore both the ethical duty and the evidentiary privilege. However, I largely expect students to master the doctrine in this chapter on their own and, rather than taking class time to review all the doctrine, I concentrate on having the students see how these doctrines actually play out in the interviewing and counseling of clients and in the other complexities of practice.

Outcomes, Assessments, and Assignments

Outcome 10-a: Reading and Analyzing Lawyer Regulation

> Students should be able to explain the scope of the attorney's implied authority to disclose information to further the representation and give examples of situations in which attorneys would regularly use this authority; identify common circumstances in which they would be likely to ask for consent to disclose confidential information or for the client to waive the attorney-client privilege; identify circumstances in which they would be unlikely to ethically ask for or obtain a client's informed consent or waiver; identify who can consent to disclosure or to waiver when the client is an entity; and explain the effect of waiving the privilege on the duty of confidentiality and the effect of consenting to disclose confidential information on the protection of the attorney-client privilege.

Reading Assignment:

Many faculty might choose to emphasize only sections 10.1 (impliedly authorized) and 10.3 (waiver by inadvertent disclosure) and simplify shared representations as a footnote to conflicts lessons and perhaps not cover 10.4 waiver by placing the matter in evidence, deferring to procedure courses for this coverage. The materials in this chapter are largely independent of one another, so you can choose to cover fewer exceptions.

Assessment:

Assessing these doctrines and rules is best accomplished through discussion of the problems in this chapter. The primary confusion to watch for is the tendency to confuse the confidentiality rules exception for consent to disclosure with the effect of disclosure as a waiver of privilege. First, some students will conclude that any disclosure, whether the product of the client's informed consent or not, waives not only the privilege but also the duty of

confidentiality. Likewise, some students will conclude that any time a client waives the attorney client privilege by disclosing a privileged communication, there is no longer any duty of confidentiality regarding those communications. A related confusion arises when students presume that simply because an attorney has the power to waive confidentiality, the attorney cannot be subject to discipline for do so, even if the attorney did not have the client's permission to do so. This power/right confusion comes up in several places throughout the course.

Outcome 10-b: Communication Skills 

> Students should be able to obtain a client's informed consent to disclosure of confidential information and draft a waiver or consent.

Assignment:

If you decide to assign section 10.2, this is material that is especially suited to role playing to appreciate that a simple rule ("privilege is waived among co-clients but attorneys should obtain consent to disclosures among the clients") is much more difficult in practice than stated. See the role-play problem in Activity 2 below.

Assessment:

Assessing the learning of the entire class can be difficult when you have a demonstration role play. Using a minute paper to gather observations from the class as a whole can help. Possibilities include asking students to develop three "rules of thumb" for obtaining consent to disclosures (such as "interview potential clients separately", "obtain consents that clients must sign separate from the engagement letter" or "give examples of the kinds of information you would be sharing among them") or directing students to draft a paragraph in an engagement letter for joint representations.

Outcome 10-c: Formation of Professional Identity 

> Students should be able to reflect on their comfort with the responsibility to exercise judgment on another person's behalf.

Assignment:

Complete the Exercise "Reflective Practice: Exercising Judgment" on page 212.

Assessment:

This is a fascinating reflection to read. Students in the class who are parents or caregivers often have excellent insights that you can then raise in class to discuss how speaking for a client is or is not like speaking for others in other roles.

Outcome 10-d: Researching Issues in Professional Responsibility ⓘ

Students should be able to research case law involving issues of professional responsibility.

Assignment:

Research Assignment 10-A on pages 227-28.

Assessment:

If students begin with a secondary source to locate cases, they might consult one of these articles. Elizabeth Chambliss, *The Scope of in-Firm Privilege*, 80 NOTRE DAME L. REV. 1721 (2005); Douglas Richmond, *Law Firm Internal Investigations: Principles and Perils*, 54 SYRACUSE L. REV. 69 (2004).

If they use a general web search engine, they may find a blog posting on the topic (an increasingly popular, and free, research source for new attorneys), from, for example, a state bar association, http://www.osbar.org/publications/bulletin/06augsep/practice. html, a web-based legal research source, http://www6.law.com/corporatecounsel/ PubArticleCC.jsp?id=1202610706720&slreturn=20130616184921, or a law firm, http://www.wc.com/assets/attachments/Application_Of_The_Attorney-Client_Privilege_And_Work-Product_Protection_To_Internal_Law_Firm_Investigations.pdf.

Using BNA, they could find current cases and analysis. For example, the July 17, 2013 Current Reports issue of the ABA/BNA Lawyers' Manual on Professional Conduct reports significant decisions on this issue by two state courts and points to the briefs in a decision pending in a third state (Oregon). The cases are RFF Family Partnership LP v. Burns & Levinson LLP, Mass., No. SJC-11371, 7/10/13 and *St. Simons Waterfront LLC v. Hunter, Maclean, Exley & Dunn PC,* Ga., No. S12G1924, 7/11/13. The pending Oregon case is *Crimson Trace Corp. v. Davis Wright Tremaine LLP,* Or., No. S061086, writ granted 3/28/13.

Suggested Classroom Learning Activities

Because this class covers a variety of somewhat separate doctrinal issues of consent and waiver, discussion of all of these issues is difficult in a 50-75 minute class period. You can be

selective in which problems you wish students to address. I have had good success covering much of the material in this chapter by using the "Talkative Client" problem at the beginning of this chapter to organize the class. I have sometimes used the "jigsaw learning" approach to addressing these questions. (Learn more about this approach in the teaching methods approach in part one). I have also used a more traditional organization of the topics, described here, with the option of role plays for some questions.

1. Set Up: Activity—Preliminary Problems and Consent to Disclosure
(Chapter 10; Outcomes 10-a)

Since all of the exceptions to confidentiality and privilege in this chapter have their root in client waiver of their confidentiality and privilege protections (either express or implied waiver; intentional or inadvertent), I start with that basic principle in its easiest form to understand: express client consent. First I remind students of the basic rules:

- Confidentiality—An attorney may disclose information relating to the representation with the client's "informed consent."
- Privilege—Privilege belongs to the client and the client may agree to waive the privilege.

I ask the students to think about the circumstances under which they might be likely to ask for consent to disclose confidential information or for the client to waive the attorney-client privilege?

They soon see that the situations are either ones in which the attorney is asking the client for disclosure as part of a strategic decision to advance the client's goals (usually one that is more closely related to outcomes than means, since otherwise the client's consent wouldn't necessarily be required as the attorney would be impliedly authorized by Rule 1.2 to make the disclosure), or that the attorney is asking the client for disclosure to protect some other interest, even at a risk to the client's own case.

I then revisit the Logan case in the "Wrong Man" introductory problem as one example. This is a good warm up and helps to connect the class to the previous one. I ask the students to define "informed consent" (referring them to the definitions section of the rules) and the process implied by this term. Helping the class to see that obtaining informed consent from a defendant (as the public defenders did in the Logan case) is not always the right thing to do (the public defenders in that case didn't ask the client to consent to their disclosing the information right away, but only asked that he give them permission to reveal after he had died) nor is it easy (the attorney's weren't sure that consent that far in advance would be effective at the time they actually wanted to invoke it because it would be difficult to prove the client had actually consented—he would be dead by then—or that the consent was truly informed). Students

sometimes suggest videotaped consent to alleviate some of these concerns since you could video the conversation that made the consent informed and there would be no questions of authenticity of signatures.

2. Demonstration: Asserting the Attorney-Client Privilege
(Section 10.3, pages 214-22; Outcomes 10-a and 10-b)

Before plunging into the exceptions to privilege, it is useful to remind students, as the *Bernardi* case emphasizes on page 217, that exceptions only apply if the privilege has first been properly raised. Thus, for example, using the "Talkative Client" you can begin by asking the students how they would protect the email from compelled disclosure. Most recognize that the email to the attorney was an attorney-client communication since it was to facilitate obtaining legal advice. Fewer will understand the procedural steps to actually raise this argument (e.g., moving for a protective order or objecting to discovery on the basis of privilege).

Some students will want to jump directly to waiver because the client forwarded the email to Seller, but I remind them that waiver is a defense and that the only question in asserting the privilege in the first place is whether this was a communication, between privileged persons, in private, for the purposes of securing or obtaining legal assistance. This is a good spot to reinforce the point made in the *Bernardi* case on page 217, that the plaintiff had the burden of proving privilege and that, in a discovery context, the "privilege log" is now required by most rules of discovery.

You can further emphasize this point by pointing out that maintaining a privilege log is a common duty delegated to new attorneys and by directing the students' attention to local rules (if any) in your jurisdiction regarding the detail required by these logs. For example, the 7th Circuit Court of Appeals requires a privilege log to describe, for each document, the privilege asserted and the facts supporting it. These facts include: the author's name and job description; the names of all recipients (whether direct or copied) and their relationship with the producing party; a general description of the document (e.g., email or memorandum); the date of the document; and a general description of the document's subject matter. *Novelty, Inc. v. Mountain View Marketing, Inc.*, 265 F.R.D. 370, 381 (S.D. Ind. 2009). Other jurisdictions permit logs to describe categories of documents. Hon. John M. Facciola & Jonathan M. Redgrave, *Asserting and Challenging Privilege Claims in Modern Litigation: The Facciola-Redgrave Framework,* 4 FED. CTS. L. REV. 19 (2010).

You can likely find attorneys in your community that would be willing to share examples of how they construct privilege logs or you could display examples from the internet from commercial litigation support services. For example, the Lexis-Nexis litigation support software provides an example of a privilege log here: http://www.casesoft.com/download/CaseMap PrivilegeLogReport.pdf.

3. Joint Representation—Role Play

(Section 10.2, pages 212-14; Outcome 10-a and 10-b)

Using a role play with these materials can be very effective for review of waiver of privilege among jointly represented clients. Alternately, you could reserve this role play for Chapter 18 (Current Clients Conflicts), where it also is very effective. Instead, if you want to cover more of the other doctrine during this class period, you could simply cover this material with question 4 on page 214. The question for this issue is "Would it matter if Seller was under investigation as well and you had entered into a joint defense agreement with Seller's attorney to share information, research, and strategies? What would the terms of the agreement have to look like? Would it protect Alvin if Seller later decided to sue Alvin?"

In either approach, I begin by reminding students of the core of the two faces of protection of information in common representation. I ask them to remember the rule regarding attorney-client privilege in joint representations: that is, that when parties are represented by the same attorney, as among them there exists an implied waiver of privilege. The privilege is retained as against the rest of the world, however. I then suggest that too many attorneys assume that means that the duty of confidentiality is similarly waived simply by virtue of the joint representation. I emphasize that an attorney owes each client a duty of confidentiality and communication and that, under Rules 1.7 and 1.9, a core aspect of conflict of interest analysis is protecting clients from circumstances in which those two duties would conflict.

Whether using problem discussion or a role play, students should be able to demonstrate their understanding that informed consent (Rule 1.0(e)) means a process in which the clients understand exactly what the consent means in terms of facts that will be shared and the alternatives/risks/benefits.

The role play takes the discussion one step further to allow students to consider how, practically speaking, an attorney might go about obtaining a consent to waive confidentiality among jointly represented clients if the attorney doesn't know what kind of confidential information each client might have. For the problem, sometimes I take volunteers to play the roles of client and attorney and demonstrate the skills for the class; other times I may divide the class into four groups so all students can participate directly. Three students play the role of clients and the fourth, the attorney. I provide each of the students playing the role of a student a set of confidential instructions. The attorneys should be instructed only that:

> Albert, Barry, and Corrine have approached you to incorporate a business for them to market a new product (a better mousetrap). Albert is an inventor, Barry is the person with the money, and Corrine has marketing expertise. Barry and Corrine are married.

Confidential information for Albert

> Albert is an inventor. Albert has invented a better mousetrap. He wants to get the mousetrap to market as soon as possible, because he initially worked with an old girlfriend to invent it and is afraid she will try to take it to market if she learns what he has in mind (even though he really believes she didn't contribute much to the invention in the first place). He hasn't told Barry or Corinne about his former girlfriend being an early collaborator because the relationship ended badly and he feels like his private life isn't their business.

Confidential information for Barry

> Barry is the person with the money. He is looking for a good investment and has been convinced by Corinne that this is it. He can't afford to invest in a losing proposition, since he has a lot of debt already from other risky investments he's made, so he wants to get in and start getting some money right away.

Confidential information for Corinne

> Corrine has marketing expertise. She likes Albert a lot and believes in his product. She's the one who connected him to Barry. She has had to work hard, though, to convince Barry and Albert that this product won't just sell itself.

I have the attorneys hold the initial client meeting and decide when and how to discuss confidentiality among the three clients. (You will need to ask the students to hold the issue of conflicts for the moment, indicating that you really can't even decide whether there is a conflict until you talk to the potential clients).

Students will need to decide whether to talk to all three first together and then separately or one at a time. They will need to decide what to tell the potential clients about the information they need and the confidentiality the three can expect from the attorney in providing that preliminary information. This will generally cause students to take a close look once again at Rule 1.18 and the shared representation materials in section 10.2.

To close out the problem, I ask students to consider what happens if someone decides to withdraw their consent (generally having the effect of terminating the joint representation).

4. Mistakes and Waivers—Case and Problem Discussions

(Section 10.3 and 10.4, pages 214-25; Outcome 10-a)

From both a practical and a policy perspective, the question of how to prevent mistaken disclosures and what to do when they happen is some of the most interesting material for students in the chapter. I begin by asking the students all the different ways in which waiver of

the attorney-client privilege (and by analogy the work product protections) might occur by mistake. These can include:

1. A client's uninformed disclosure
2. An attorney's unauthorized disclosure
3. An inadvertent disclosure by either client or attorney
4. A failure to timely object when discovery or testimony regarding privileged communications is sought
5. An assertion that places the communication in evidence, without having considered the effect on privilege.

I put these various "unintentional waivers" on the board and we work through each one.

1. Client disclosures

We begin with a client's disclosure. The preliminary "Talkative Client" problem addresses this issue by asking about Alvin's sharing an email. It is useful to start from the perspective of the attorney who might be suing Alvin and ask the students why that attorney might want to obtain the email. This can help the students better appreciate that the attorney-client privilege doesn't apply to facts, only communication, so that even if the email isn't discoverable, that doesn't shield the client from being asked about the facts that are being communicated in that email. The advantage of the email itself, is that documents can keep testimony honest and memories fresh.

Students should recognize that Alvin waived privilege because he voluntarily disclosed privileged communication to a non-privileged party and that he likely waived the protections of the work-product protection also. The Martha Stewart case, cited on page 198-99, is a good example of a similar situation in a very readable opinion. *United States v. Stewart,* 287 F. Supp. 2d 451 (S.D.N.Y. 2003). [In terms of more information, students might was whether Seller was an "agent" of client in such a way that his involvement was necessary to facilitate communication (pages 195-96) though this seems most unlikely. They might also wonder if he was a common defendant (pages 212-13) being jointly represented by the attorney with the client. If so, privilege may still exist as against third parties.]

I ask the students, in what sense could an attorney be subject to discipline because a client discloses privileged communications and thereby waives the privilege? This helps reinforce the idea that the attorney must communicate (Rule 1.4) with the client about the privilege and how to protect it. Students should point to Rule 1.6(c)'s provision that "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" as a directive requiring this communication.

2. Attorney unauthorized disclosures

Asking the students if the answers to these questions would be the same if the attorney had been the one to forward the email can help students appreciate that an attorney has the power to waive privilege for a client even in circumstances in which doing so would violate the attorney's ethical duty of confidentiality because the disclosure wasn't authorized. This also reinforces the understanding that, when it comes to disclosures, relying on implied authorization can be very risky.

3. Inadvertent disclosures

To further the discussion, you can turn to the preliminary problem's additional questions related to inadvertent disclosure and the *Peterson v. Bernardi* case (section 10.3 of the chapter on pages 214-22). I always begin with the disclosure in that case, because this permits review of the "how to handle mistakes" materials covered earlier in the course. I use the law students and their supervising attorneys in the *Peterson* case and ask the student how they could have prevented the inadvertent disclosure in that case. The answer is not obvious and the vague explanations the attorney gave in the case regarding the steps taken to prevent inadvertent disclosure were clearly unsatisfactory (page 218). One might speculate as to whether that there was a failure of Rule 5.1 here in supervising law students who may have been on the front lines of the document review process. Ask students to imagine the kinds of steps the attorneys might have taken, including providing better training, implementing better procedure, having fail-safe systems in place for the most sensitive of documents, employing technological assistance in the document review process if possible, and asking for more time.

Turning to the receiving attorney's obligations, the policy split among the courts provides an excellent source for debate. Asked what a receiving attorney should do when they acquire documents or hear conversations that they realize are privileged, the students should be able to point to Rule 4.4(b), which requires the receiver to promptly notify the sender. Beyond that, states are fairly evenly split regarding whether Seller's attorney could even look at the document. I poll the class regarding the preferable rule and briefly call for rationales for these varying positions.

Finally, one can explore the effect of inadvertent disclosure on the attorney-client privilege. Here again one can have students discuss the variety of approaches to waiver and the middle-ground approach in the Federal Rule of Evidence 502(b) and the *Peterson v. Bernardi* case factors. I ask students to give examples of facts that would tip the balance either way on the

Talkative Client inadvertent disclosure problem as to each of the *Bernardi* factors. This is especially interesting when asking the students to hypothesize factors that would tip the scales against waiver "in the interests of fairness and justice" (page 220).

4. Placing the Matter in Evidence

This topic is covered by the preliminary problem question, "Suppose Alvin tells government investigators that he had consulted a member of your firm regarding the legality of his sale of stock" and is discussed in 10.4 and the *In re Seagate Technology, LLC* case (pages 222-25). Again, you can choose to address the issue simply—by noting that a failure to object waives the privilege—or more broadly by addressing the *Seagate* case.

The *Seagate* case presents a fairly straightforward proposition: even when one is relying on the advice of counsel defense, the opinions of trial counsel are different than the opinions of the counsel who originally advised on the transaction in dispute. This case is especially helpful for forcing students to articulate the distinction in roles between counseling and advocacy. The distinction may seem self-evident to some students, who will have difficulty understanding how communications with defense counsel after wrongdoing has been claimed could be merged with discussions with opinion counsel designed to avoid those consequences. For other students the distinction will be less clear. These are the students who will have particular difficulty in the next chapter in identifying the situations in which an attorney, aware of a client's wrongdoing, has discretion to reveal that wrongdoing. For the students who cannot fathom why the case would continue to generate so much litigation, it can be useful to ask students to think of situations in which the line between opinion counsel and trial counsel would blur. The text asks students to imagine the "exceptional circumstances" the court might have in mind that would provide an exception to the general rule it announces. The full court opinion provides the following example: "if a party or counsel engages in chicanery" and students can arrive at this example without this prompt (though I do like the word as a description of sharp practices).

When wrapping up this list of situations in which disclosures can waive the privilege, be sure to reiterate the relationship between these discussions of waiver of privilege and the ethical duty of confidentiality. Ask students "if a waiver of privilege under the rules of evidence occurs without the client's knowledge or consent, how does that relate to the attorney's ethical duties under the rules of conduct?" Students should recognize first that many of these situations of unintentional waiver are also violations of one or more of the attorney's ethical duties—communication (informing the client about steps to protect privilege), confidentiality (when the attorney is the source of the disclosure), or supervision (when an attorney has not trained or supervised document review staff). Second, students should remember that simply because the privilege is waived as to a particular communication, doesn't mean the attorney no longer has an ethical duty to continue to try to keep that information confidential.

5. Attorney Self-Defense Exceptions—Problem Discussion and Research Reports
(Section 10.5, pages 225-227; Outcome 10-a)

The attorney self-defense exceptions to confidentiality and privilege are not as easily grounded in waiver or consent as are other parts of the chapter. In the past, I have sometimes included this material in the discussion of collecting fees, because that is a common situation in which the exception is invoked. However, I have found that discussing these exceptions works better as part of the overall discussion of exceptions to confidentiality and privilege. To tie this exception to those in the rest of the chapter, one must view them as species of waiver based on the client's misconduct. For the exceptions under Rule 1.6(b)(5) and the parallel privilege exception, one reason an attorney is excused from the fiduciary duty to guard the client's information in these circumstances is because the client has abused the relationship (either by failing to fulfill an obligation to the attorney or by misusing the representation in such a way that an attorney is implicated in client wrongdoing). See comment 11 to Rule 1.6. For the exception under Rule 1.6(b)(4), most attorneys prior to this express authorization in the rules considered this type of disclosure to be impliedly authorized (though not to the extent of waiving privilege).

The preliminary problem hypothetical that asks what the attorney can do if the SEC investigation implicates the attorney's conduct is designed to focus student attention on these exceptions.

Students readily understand the general thrust of the exceptions, though I find it useful to ask them to provide examples of the categories of situations in which the exception applies: to establish a claim (e.g., collect fees); to establish a defense (e.g., respond to the client's malpractice claim); to respond to allegations in other proceedings (e.g., ineffective assistance of counsel claims, third-party suits against the attorney); or to secure advice (e.g., if an attorney needs assistance determining the presence of a conflict of interest).

One part of the exception that students need to have reinforced is that they need not rely on these exceptions if they can simply obtain the client's express consent to disclosure. Where the attorney's and client's interests are not in conflict (as might be when a third party is alleging wrongdoing by either or both or when an attorney needs advice on the attorney's own obligations), an attorney may wish to consult with the client before making the disclosure.

Another part of the exception for self defense that bears reinforcing is comment 10's proviso that an attorney need not await formal charges or proceedings in order to respond to an allegation of misconduct.

The final part of these exceptions that is especially important for students to understand is that the attorney may only disclose what is reasonably necessary to achieve the purpose for which the exception provides. The *In re Huffman*, 983 P.2d 534 (Or. 1999) case cited in the text

at 227 is a particularly egregious example of excessive disclosure. In that case, an attorney sought to collect a $2000 fee that his client had previously discharged in bankruptcy. He sued his client after the bankruptcy discharge, attached property that he knew of because of the prior representation, served by mail and publication, and obtained default judgments. When the client subsequently learned of these suits and secured an attorney, Huffman further disclosed client information about the client's divorce, possible criminal activities, and other private information, and threatened to take this information to the U.S. Attorney. While this example is extreme, it is helpful to lead students in a discussion how the "reasonably necessary" standard applies in situations in which disclosing client information would not only hold the client responsible for an obligation to the attorney but would have other harmful consequences.

The "Test your Understanding" problem at the end of the chapter provides a fascinating example of how discretionary the line can be in permitting attorneys to disclose client facts. In the case on which the problem is based, the court held:

> While such vindictive behavior casts shame on the entire profession, the Court is not persuaded that the expression of Respondent's personal opinion regarding the Krishnamurthys' character constitutes a disclosure of confidential information under the rules. The cases cited by the CDC are distinguishable in that they involve situations where attorneys divulged substantive facts learned in the scope of representation as opposed to subjective opinions formed thereafter. Further, the outstanding debt was a matter of public record by virtue of the collection action.

In re Lim, 210 S.W.3d 199, 201-02 (Mo. 2007). Judge Denvir-Stith dissented, arguing that the disclosures did violate Rule 1.6 and disagreeing with the court's unique interpretation of the "generally known" exception under Rule 1.9 as including any information that is a matter of public record.

For additional reinforcement of this exception, you might refer students to review questions 1 & 2, mistakenly placed at the end of the following Chapter (Chapter 11, page 252). The answers:

1 Reporting to a credit reporting bureau is not "necessary" to collect the bill and turning the bill over to a collection agency may be reasonably necessary so long as the attorney limits the information provided to that agency. Whether the attorney can ethically sue and attach the client's secret bank account would depend principally on the other alternatives the attorney had to collect the fee and the effect of this disclosure on the client.

2. The attorney may write back to the SEC and divulge client confidences as necessary to defend so long as the attorney is confident the SEC is alleging that the attorney was involved.

b. The attorney need not wait until actually charged.

c. The attorney need not ask your client if she is willing to consent to your disclosure before you respond; though comment 16 to Rule 1.6 does suggest that "where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure." It is difficult to imagine what the client might do in this situation—perhaps tell the SEC that the attorney wasn't' involved. An attorney would want to be especially cautious in asking a client to protect him or her in this way, especially since the client might easily waive attorney-client privilege along the way.

If you assign the research assignment in the chapter, this would be an excellent point at which to ask students to report on what they found regarding the attorney's ability to assert privilege or work-product protection to prevent the disclosure to a client of internal firm memoranda regarding an attorney's ethical questions. (See outcome 10-d above for materials on this question).

6. Selective Waiver Problem Discussion
(Section 10.1, pages 210-12; Outcome 10-a and 10-b)

Of all the doctrines in this chapter, this is the one for which I am most torn about coverage. On the one hand, the settings in which the issues arises are rather limited. On the other hand, the issue has generated a great deal of debate (perhaps in part because of the players whose interests are most often at stake). How deeply you want to address this issue may depend in large part on the type of practice most of your students will be entering. This issue is addressed by the part of the Talkative Client preliminary problem which asks: "Suppose the SEC offers to settle the civil matter in exchange for Alvin's cooperation in tracking down the source of the insider information that caused him to sell his stock. How would you counsel Alvin in making this decision?" This question directs student attention to page 212, where the problem is discussed in more detail.

Students should recognize that even if the government offers a "selective waiver,"—even with a confidentiality agreement—the overwhelming majority of courts have rejected this theory. Without selective waiver, disclosure would waive the privilege and would allow any third party access to the information unless other steps were taken to limit access. This could lead to legal actions from outside parties. Under FRE 5.02(2), when disclosure is made to a federal agency, and the attorney-client privilege is waived, then the waiver extends to undisclosed information of the same subject. This opens the door to potential federal, criminal prosecution. On the other hand, cooperation may be worth this risk because of the benefits it might bring in gaining the good graces of the SEC.

An outstanding recent opinion from the 9th Circuit is well worth your own review and even assignment to students. The facts are fascinating, involving a fight over the intellectual

property rights to Superman, and centered around the efforts of an attorney/businessman who was working with the heirs of Superman's creators and whose attorney-employee steals confidential documents and gives them to DC Comics. Full of drama and ethical twists and turns, the story is an interesting backdrop for the 9th Circuit's rejection of the selective waiver theory (among a variety of other arguments made to try to protect the stolen documents from being subject to discovery). The case is *In re Pacific Pictures Corp*, 679 F.3d 1121 (9th Cir. 2012).

7. Closure

Because students are most likely to confuse confidentiality exceptions and privilege exceptions, I provide students a basic chart at the close of this class reinforcing the distinctions. Alternately, you might choose to provide the chart with some sections omitted and ask students to fill in the blanks.

Waiver of Attorney Client Privilege and Ethical Duty of Confidentiality	
PRIVILEGE	CONFIDENTIALITY
Client owns the privilege and can decide whether to assert or waive its protections; however, attorney has the power to waive privilege even if unauthorized	Attorney has an ethical duty to protect all client information, especially attorney-client privileged information; an attorney's unauthorized waiver of privilege would violate confidentiality duties.
Inadvertent disclosures may waive privilege (jurisdictions vary on the test—most use a balancing test).	Inadvertent disclosures may violate attorney's ethical duty to communication, protect confidential information, and supervise others in firm.
Disclosure of a communication outside a privileged relationship waives the privilege as to the communication as against any other person. Few jurisdictions recognize doctrine of selective waiver.	Waiver of privilege does not destroy the attorney's obligation to continue to try to protect that communication from further unauthorized disclosure.
To receive protections of privilege, the defense must be raised in a timely fashion and proven. Failure to object waives the privilege.	An attorney's ethical duty includes the obligation to raise a non-frivolous claim of privilege where it applies. However, the 1.6(b)(6) exception to the ethical duty to comply with court order permits the attorney to disclosure if the objection is overruled.
Between jointly represented clients, privilege is waived by operation of law.	An attorney owes an independent duty of both communication and confidentiality

	to jointly represented clients, so that most joint representations require the client's express consent to shared information.
Where client places attorney's advice in evidence (as in malpractice action), client has waived privilege. In other circumstances, courts have found an implied exception for attorney self-defense, including fee recovery, but jurisdictions vary in their interpretations of the scope of the exception. Generally no exception for attorney to seek advice on own conduct.	Attorney may reveal confidential information to secure advice, assert a claim against his client, and defend himself or his employees or associates against an accusation of wrongful conduct.

Given the breadth of topics covered in this class, an excellent closure to this class is simply to ask students for questions or even to use a minute paper and have them write down the biggest question or confusion they have remaining at the end of class. Relevant portions of the Restatement (cited at the end of the chapter) can be an excellent source for further clarification.

Chapter Eleven: Exceptions to Confidentiality Designed to Protect Third Persons

Students need help not only mastering the doctrine in this chapter but in delineating their own personal moral stance on the issues presented.

Outcomes, Assessments, and Assignments

Outcome 11-a: Reading and Analyzing Lawyer Regulation

Students should be able to identify three common categories of exceptions to exceptions to confidentiality to protect third persons; define key concepts of exceptions to confidentiality to protect third persons including fraud, knowledge, and informed consent; and be able to apply these terms to determine whether an exception to confidentiality exists in a given circumstance.

Reading Assignment:

Chapter 11. Rule 6.1 and comments. Rule 1.1 definitions.

I emphasize to the students that they will need to keep several sets of rules straight as they read this chapter. Not only will they need to be aware of whether they are reading rules that relate to the attorney-client privilege or to the ethical duty of confidentiality, but they will also need to be aware that there are many versions of the ethical duty of confidentiality they will be studying.

Assessment:

For the 1.6(b)(2)&(3) exceptions I always use a "state the rules" minute paper to assess student mastery of the elements of this exceptions. Quizzes can also be especially helpful for this topic as can assigning the CALI lesson cited at the end of the chapter.

Outcome 11-b: Formation of Professional Identity

Students should be able to express a well-informed opinion regarding the policy wisdom of each of the exceptions to confidentiality designed to protect third persons and predict their reaction when they have the discretion, but are not required, to disclose client information.

Discussion Forum Assignment:

For this class, I distribute to students a handout with the following rules and ask students to post to the discussion forum their opinion on the version they think strikes the best balance between the needs of the client, the profession, the justice system, and the public.

Variations on the Rules of Professional Conduct to Protect Third Persons

Of all the rules of professional conduct, the exceptions to confidentiality are the most controversial.

VARIATIONS ACROSS TIME

1983 Model Code of Professional Responsibility
DR 4-101 -Preservation of Confidences and Secrets of a Client.10
…. (C) A lawyer may reveal:
…. (3) The intention of his client to commit a crime and the information necessary to prevent the crime.

1984 Model Rules of Professional Conduct
Rule 1.6(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; …

Current Model Rules of Professional Conduct
Rule 1.6(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
(1) to prevent reasonably certain death or substantial bodily harm…

VARIATIONS ACROSS JURISDICTIONS

Missouri Rules of Professional Conduct, Mo. Sup. Ct. Rule 4-1.6(b)
(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
(1) to prevent death or substantial bodily harm that is reasonably certain to occur;

(This is the very similar to the current Model Rule 1.6(b)(1)—there is no equivalent to 1.6(b)(2)or (3))

Kansas Rules of Professional Conduct, Ks. Sup. Ct. Rule 1.6(b)
A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) To prevent the client from committing a crime…

(This is the same as the 1983 ABA Code of Professional Responsibility. There are no other exceptions to prevent harm to third persons)

Iowa Rules of Professional Conduct, Iowa Sup. Ct. Rule 32:1.6
In addition to the language of Model Rule 1.6(b)(1)-(6), Iowa includes this provision:
(c) A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent imminent death or substantial bodily harm.

I ask students to post to a discussion forum regarding which of the versions of the exception to confidentiality they prefer. I also give students the option to complete the reflective practice assignment on page 250. This is one of the very first journaling assignments I ever gave to students. Reading these essays can be an emotionally wrenching process. This particular prompt was one suggested to me by Professor Judith Maute of the University of Oklahoma. She has told me that one of the reasons she has long since stopped requiring it, is the emotional energy required for reading the responses.

Assessment:

For further guidance on using reflective learning see the appendix.

Outcome 11-c: Researching Issues in Professional Responsibility ⓘ

Students should be able to locate laws other than the rules of conduct that may require an attorney to disclose confidential client information.

Research Assignment:

Research Assignment 10-A on pages 227-28.

Assessment:

This is an excellent problem for students to discover free online government search services. In this instances, the Children's Bureau, Administration for Children and Families, of the U.S. Department of Health and Human Services provides a relatively up-to-date state statute search service at https://www.childwelfare.gov/systemwide/ laws_policies/state.

For a complete search, however, students would want to take the statutes found through such a service and check their currency. Most state legislative websites provide information about the currency of the statutes provided there and also provide keyword searching for more recent legislative activity. The National Conference of State Legislatures provides a 50-state Legislative Tracking web search engine at http://www.ncsl.org/legislative-staff.aspx?tabs=856,34,735. Of course, commercial research services also provide state code updates.

As with any research assignment, I urge your collaboration with your school's legal research librarians.

Suggested Classroom Learning Activities

1. Set Up: A Duty to Disclose

(Section 11.1, pages 232-33; Outcome 11-a)

As I begin this class session, I remind the students once again that this is an area in which they will be learning many variations of rules—variations that appear over time and across jurisdictions. I emphasize to them that it is important to learn these variations both because they may be practicing in various jurisdictions but also because this is an area of law that is controversial, and therefore, unstable.

Before we look at the exceptions that permit disclosure, I like to start with the students' understandings regarding the duty to report a client's crime. Some students have a general impression that attorneys have a duty to report any situation in which the law is being violated. To clear up the general law requirements, I ask students two questions for them to consider, not as attorneys, but as citizens:

Q. In general, is it a crime to fail to report if you know someone has committed a crime?

A. No. If students have not otherwise studied the common law crime of misprision of a felony, a brief description of the general rule will help to orient the class.

> Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both.
>
> 18 U.S.C. §4 (2012).

According to the Second Circuit, "Misprision of Felony has its roots in the common law which recognized a duty to raise a 'hue and cry' and report a felony to the authorities." *U.S. v. Cefalu*, 85 F.3d 964 (2d Cir. 1996). The elements of Misprision of Felony are 1) the principal committed and completed the alleged felony; 2) defendant had full knowledge of that fact; 3) defendant failed to notify the authorities; and 4) defendant took steps to conceal the crime. *U.S. v. Cefalu*, 85 F.3d 964 (2d Cir. 1996). "Mere silence, without some affirmative act, is insufficient evidence" of the crime. *Lancey v. United States*, 356 F.2d 407, 410 (9th Cir. 1966), *cert. den'd*, 385 U.S. 922 (1966). "Concealment—indeed an affirmative step to conceal—is a required element; mere failure to make known does not suffice." *U.S. v. Warters*, 885 F.2d 1266, 1275 (5th Cir. 1999).

However, some states do have their own versions of this law that may impose criminal liability for failures to report even without affirmative actions to conceal. Mass. Ann. Laws ch. 268, §40 (1992); Ohio Rev. code Ann. §2921.22 (1993); Wash. Rev. Code Ann. §9.69.100 (1992). Students should be instructed to research their own state's law.

Q. In general, is there a civil liability for failure to disclose a person's intent to commit a crime or otherwise hurt someone?
A. No. Refer the students to page 251 for the discussion of *Tarasoff* and its very limited reach.

Q. Are there any other laws that might require that someone report another person's crimes or frauds?
A. Yes, and we will examine these in subsequent chapters. Most impose a duty to report only on a discrete class of individuals who have a special relationship or special knowledge. Examples of these include the duties to report child or elder abuse imposed on those who are entrusted with the care of children or elders (teachers, doctors, child-care workers, nursing home providers, etc.); public health duties of physicians (e.g., to report gunshot wounds or suspicious deaths); or the duties of heavily regulated industries to provide reports as part of the regulatory structure (e.g., banks, securities, lawyers).

2. Variations on Rules

With the general law parameters established, I then distribute a handout with different versions of the exceptions to confidentiality relating to danger to others. (See Outcome 11-a above).

I have assigned students to complete the following charts (here with answers filled in) from the rules I have distributed earlier.

We begin with variations across time. I display the completed chart for the students to compare to their own and ask if anyone has questions.

	Model Code of Professional Responsibility DR 4-101 (1983)	Model Rule of Professional Conduct Rule 1.6(b)(1) (1984)	Model Rule of Professional Conduct Rule 1.6(b)(1) (Post 2002)
Whose act?	Client	Client	Anyone
What act?	Crime	Crime	Any act
What consequences?	Any	Imminent death or substantial bodily harm	Reasonably certain death or substantial bodily harm
What disclosures?	Necessary to prevent crime	Necessary to prevent crime	Necessary to prevent death or harm
Disclosure mandatory?	No	No	No
What attorney knowledge?	None	Reasonable belief	Reasonable belief

I then ask students how they would describe the trend regarding the development of these standards as regards protecting third persons from death or bodily injury. Students should see that the range of situations in which an attorney can reveal information to prevent a life has expanded in that:

The actions that threaten life or bodily harm need no longer be crimes; thus even situations such as a client's threatened suicide, which would not be a criminal act in most states, could be reported if the attorney reasonably believed reporting would prevent it.

The death need not be imminent, just reasonably certain, so that actions that threaten death over time (such as environmental crimes) can be reported.

The actions that threaten life or bodily harm need no longer be those of the client; thus an attorney can disclose actions by others even if the client may not want to consent to having this information disclosed.

I comment on the fact that the model code was much broader in its exceptions in the sense that any crime, regardless of consequences, was subject to being reported.

I then display the chart for the jurisdictional variations. I use jurisdictions in our region. When choosing jurisdictions to compare in your region, try to have examples of a rule based on the ABA Code, one based on the current Model Rule, and one with a mandatory reporting requirement (the textbook provides Illinois, Iowa, and Texas as examples).

	Kansas	Iowa	Missouri
Whose act?	Client	Anyone	Anyone
What act?	Crime	Any act	Any act
What consequences?	Any	Imminent death or substantial bodily harm	Reasonably certain death or substantial bodily harm
What disclosures?	Necessary to prevent crime	Necessary to prevent death or harm	Necessary to prevent death or harm
Disclosure mandatory?	No	Yes	No
What attorney knowledge?	Reasonable belief	Reasonable belief	Reasonable belief

I ask the students to compare the state rules with the model versions. They should see that the Kansas rule is based on the ABA Code, the Missouri Rule is based on the current Model Rule, and that Iowa is a combination of the older version of the Model Rules except that disclosure is mandatory.

I poll the students regarding which version of the rule they prefer and why. (See Polling Technique in Part One for suggestions on this technique).

This exercise is generally sufficient to both review the essential elements of these rules and bring home the point that there is little settled agreement on how far an attorney's discretion should go in revealing information, even to prevent death.

2. Case Discussion

(*McClure v. Thompson,* pages 233-39; Outcomes 11-a and 11-b)

We explore the *McClure* case to understand how difficult exercising the discretion provided by the rules can be. I have provided here some of the questions I ask, with some comments on responses you might receive:

Q. This case was an ineffective assistance of counsel case. How do you think that might have influenced the court's analysis?

A. Students should recall from prior study that there is a strong presumption of effectiveness in these appeals and that, if the court found Mecca ineffective here, McClure's conviction would

be reversed. That's a different frame for the issues than if the case had been one for discipline, for example.

Q. If the law in this case was the same as Illinois, Iowa or Texas, would Mecca's decision have been any easier?
A. No, it would have been harder because he would have been required to report and would still be faced with the same dilemma regarding whether he had enough information to know that the children would still be alive.

Q. Given what you have read about McClure, how likely is it that Mecca could have obtained McClure's informed consent to disclose the map?
A. Students will often conclude immediately that McClure was unable to provide informed consent. This can provide an opportunity to address Rule 1.14 and the attorney's duty to treat a client with limited capacity as an ordinary client as much as is reasonably possible. This also permits a discussion of the concept of "capacity" with the opportunity to reinforce to students that the capacity of an individual can vary at different times and for different types of decisions. Students will also argue that no client who understood the consequences of revealing evidence they had murdered someone would do so, but others will recognize that a client goals need not necessarily be to avoid the consequences of their actions.

Q. The version of the rule in 2000 applied by the court permitted attorneys to disclose information to "prevent the client from **committing a criminal act** that the lawyer believes is likely to result in imminent death or substantial bodily harm." How did the court interpret this provision to permit disclosure after the client had already been arrested?
A. Students should recognize how far the court had to go to interpret this language to include preventing a client's past act from turning into a more serious crime.

Q. The rule provides that the attorney must believe the client's criminal act is likely to result in harm. What does it mean to "believe" something?
A. Students should refer to the Rule 1.0 definition, which indicates that the test for belief includes a subjective (actually believe) and objective (the belief is reasonable) component. They should compare this to the definition of "knowledge" which can, according to the rule, be inferred from circumstances.

Q. In defining "belief," the McClure court applied a standard of "objective reasonableness in light of the surrounding circumstances" rather than the "firm factual basis" standard that is applied by most courts in setting the level of knowledge necessary before an attorney must reveal a client's perjury to the court. Why should the standard for revealing perjury to a court be so much more difficult to meet than the standard for revealing information to prevent death or substantial bodily harm? Is it significant that if an attorney knows the client has committed

perjury, he ordinarily will be required by the rules to reveal that information whereas Rule 1.6(b)(1) is only a "may" rule?

A. Of course students could disagree and argue that they should be the same standard, but some will recognize that the difference between a rule that requires disclosure and one that permits disclosure could explain the difference in thresholds.

Q. The court of appeals holds that the ultimate question of whether an attorney's belief that disclosure is reasonably necessary is a question of law. What is the significance of this decision?

A. This characterization takes the "reasonably necessary" decision out of the hands of a jury and permits a summary judgment. The standard of review on appeal is de novo for questions of law. Finally, the question of "reasonably necessary" becomes a policy question rather than a factual question (in this way, the standard is much like the proximate cause standard student studied in their first-year Torts classes).

To wrap up this discussion, I poll the students on other aspects of the case, asking, "Do you agree that Mecca's belief that the children might be alive was reasonable?" and "Do you agree with the dissent that Mecca should have gone to the site to verify that the children were alive before revealing the map?"

This latter question leads nicely to a brief discussion on physical evidence (note 2 on page 238).

Q. Rules of professional conduct in states that have adopted the Model Rules do not require an attorney to reveal a client's crimes or actions, even if they threaten life, an attorney may not withhold contraband or the fruits and instrumentalities of crime. What would be examples of these?

A. Weapons, drugs, money, cars, etc.

Q. So if, as note 2 suggests, McClure had brought his gun to Mecca, what should Mecca have done?

A. Some students immediately say, "Tell him to take the gun and get out." But when reminded that the reason he wants to give it to you is that he wants to keep himself from using the gun, they reconsider. However, having taken the gun into their possession, they should recognize that they can examine, test, or move it, although not if that would destroy evidence, and then they must, within a reasonable time, give it to police or prosecution. Finally, they should recall that if the only link to their client would be their testimony, the evidence is inadmissible.

3. Disclosure of Client Frauds: Elements of the Exceptions

(Section 11.3-.4, pages 239-250; Outcome 11-a)

To begin the discussion of this exception to confidentiality, I ask the students to close their books/computers, and take out a piece of paper and complete this minute paper:

Complete this sentence as to client wrongdoing that would NOT result in death or bodily harm:

"A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary _____."

I collect the papers and review them after class to monitor student progress in reading and mastering rules. After I have the minute papers, I display the elements of the rule. I ask the students to think about whether they have missed any elements. Often students will not include the "attorney's services were used" part of the rule.

I then ask the students to consider, whom this rule is designed to protect. Students now more readily realize that the rule is designed to protect attorneys as much as clients or the public.

The rules exercise on page 239 asks students to define fraud, informed consent, reasonably, reasonably believes, and substantial. The *McClure* case explores the terms "reasonably" and "reasonably believes" so students should have some better ability to define these terms. Likewise, the prior chapter explored "informed consent" so that students should be able to describe this process. "Substantial" is a relatively straightforward term for which students can suggest absolute or relative definitions. The most difficult term for students to understand is "fraud" in part because many may believe there is a single definition of the term. I provide a short lecture on fraud to help fill out this aspect of the rule. Here are my notes for that lecture. You will likely want to supplement with commentary on your own jurisdictions' laws.

Fraud is not so much a particular crime or tort, as it is a concept that one can find in many different crimes or torts. Much like terms such as estoppel or reasonable or implied, fraud is a concept and its meaning changes depending on the circumstances in which it is being used. In 1941, Judge Holmes of the United States Court of Appeals for the Fifth Circuit (that would be Edwin Ruthven Holmes, not Oliver Wendell) stated that, "The law does not define fraud; it needs no definition; it is as old as falsehood and as versable as human ingenuity."[45] But we try to define it anyway. My favorite definition of fraud comes from *Black's Law Dictionary, 5th edition* (the 5th edition is my favorite because it tends to include quotations from cases and a wider variety of definitions than the current edition), which says that fraud is:

> All multifarious means which human ingenuity can devise, and which are resorted to by one individual to get an advantage over another by false suggestions or suppression of the truth. It includes all surprises, tricks, cunning or dissembling (disguising, concealing), and any unfair way which another is cheated.

The exception to fraud in Rule 1.6(b) is not the first place in the rules we have seen the term "fraud." Recall that Rule 8.4(c) provides that one category of misconduct is, "conduct

[45] Weiss v. U. S., 122 F.2d 675, 681 (C.C.A. 5th Cir. 1941).

involving dishonesty, fraud, deceit or misrepresentation" but neither the rule nor the comments define what fraud means. The list seems to imply that fraud is something different than dishonesty, deceit, or misrepresentation but what the difference might be is simply not clear. Likewise, Rule 1.16(b)(3)-(4) permits withdrawal in certain instances of client fraud, even if the withdrawal will cause material adverse effect on the client. So we look to the definitions section of the rule. Rule 1.0(d) defines "fraud" or "fraudulent." Read that rule carefully and answer the following questions:

1. Does fraud require intent to deceive or mislead?

There are many uses of the term "fraud" in the substantive law that do not necessarily include an intent or purpose requirement. So, for example, "constructive fraud" is a term out of equity that is often applied in the context of fiduciary or confidential relationships and need not involve a false representation at all, but could simply be a failure to disclose information. By requiring a purpose to deceive in the definition, the Model Rules have excluded these categories of "innocent" fraud from the rules definition.

2. Could a negligent misrepresentation or negligent failure to inform someone of facts constitute fraud under the rules?

No. There must be intent to deceive.

3. How do you prove a purpose to deceive?

Rarely will someone who is engaged in fraud admit their purpose. Rather, fraud must nearly always be inferred from circumstances. Just as attorney Mecca in *McClure* could reasonably believe the children were still alive based on the overall circumstances, so too an attorney might be "reasonably certain" his or her client is engaged in fraud based on circumstances. You might ask students if they have studied the idea of "badges of fraud" that are used to infer a fraudulent transfer in debtor-creditor and property law. Some common badges of fraud recognized by the courts include lack or inadequacy of consideration, a close or confidential relationship among the parties, an individual retaining control after making a transfer, a transfer that takes place in the shadow of litigation, and transactions conducted with unusual speed or secrecy or in unusual manner. 37 C.J.S. Fraudulent Conveyances § 55 (2013).

4. Does fraud under the rules require proof of reliance? Injury?

No, see the comments to Rule 1.0. While reliance is a key aspect of most causes of action involving fraud, and injury is an element of torts sounding in fraud, neither are necessary to the rules. In this case, the definition of fraud is much closer to the meaning of constructive fraud. Because constructive fraud is more often used to disgorge unjust benefits or permit rescission of a contract, rather than providing an action for damages, concepts of reliance or injury are often relaxed.

4. State v. Gonzales Case Discussion

(Section 11.4, pages 241-50; Outcome 11-a)

The *State v. Gonzales* case can be used to review many basic of confidentiality and privilege. However, the case is also useful for both review of past materials and previews of coming attractions in the course, so I take some time with it. If you do not intend to otherwise discuss the special rules governing prosecutors, the case is helpful for that purpose. Since the "fraud" in the case is perjury, the case can also be used as an introduction to the next chapter's study of Rule 3.3.

Because the case is so effective for all these purposes, I generally introduce the case in one class, using it to review appointments, withdrawals, confidentiality, etc. and then use a second class to use it to introduce Rule 3.3 and candor obligations (the next chapter).

I provide here the questions and suggested discussion points I use with this case.

Q. This case involves an attorney (McKinnon) and the public defender's office of which she was a part that represented not only Gonzales, but another client who revealed her intent to commit perjury for Gonzales (likely to provide an alibi). The attorney's office withdrew from representing the other client because this presented a conflict of interest (we'll see why that is so in more detail in Unit Five). The case against Gonzales was dismissed. Then about a year and a half later, the case against Gonzales is refiled. If McKinnon had been a private defense attorney whom Gonzales had asked to represent her, she could have simply refused and that would have been the end of it. But instead she was appointed to represent Gonzales. Recall that Rule 6.2 provides that an attorney shall not seek to avoid an appointment without good cause. Why didn't Gonzales try to avoid this appointment in the first place?

A. This question helps students to see that, for public defenders and other attorneys whose duties include accepting appointment, there is not an opportunity to "avoid" a particular appointment. The appointment is made and the attorney's only choice if they have a problem with the appointment is to request to withdraw.

Q. When the former client who had said she would perjure herself appeared on the prosecution witness list for Gonzales's trial, McKinnon moves to withdraw. What part of Rule 1.16 was she likely relying on as the basis for withdrawal?

A. Likely the attorney believed that continued representation presented a conflict of interest because she would be limited in her cross examination. Why would she be limited? Because if the former client did testify, she would have the difficult choice of how to respond to what might be perjury (which you will see might require her to do something about that under Rule 3.3). We will come back to this question more as we study Rule 3.3.

Q. Consider the attorney's statement upon her request to withdraw (Page 243, middle of page). Did she violate Rule 1.6 and 1.9 by revealing this information to the court?

A. Some students will reiterate the court's conclusion that this material wasn't protected by

the duty of confidentiality because the exception for revealing information to prevent the client from committing a crime applied. But that was not apparently how McKinnon viewed the issue, so one wonders why she felt it was appropriate to include the details in her withdrawal motion.

Q. What if the current Model Rule applied, in which the exceptions would be much narrower (death/injury/financial fraud involving lawyer)? Would McKinnon have violated her obligation of confidentiality under those circumstances?

A. Some students will want to argue that the statement didn't actually identify the former client so it didn't reveal confidential information. These students may be confusing the general rule that privilege does not protect client identity and certainly are reading the ethical duty far too narrowly. The attorney believed she had violated the rules in making this disclosure (see Page 248). Other students will argue that she had to include this information on the motion to withdraw, implying that the ethical duty of confidentiality doesn't apply in this context. Students should be asked to look back at page 226 of the text where this question is raised in the context of requesting withdrawal due to a client's failure to pay. You can direct their attention to the comment 3 of Rule 1.16 and comment 15 to Rule 3.3 both of which reaffirm that the duty of confidentiality applies even in a motion to withdraw and she would need to limit her disclosures only to the extent the rules permit. Of course Rule 1.16(c) itself directs that "a lawyer must comply with applicable law" regarding requests to withdraw, so part of the answer to this question depends on what local rules require by way of explanations.

Students will want to know how you can effectively withdraw without revealing confidential information. If you know your local practice, you can explain; if not, you might ask. In most jurisdictions, courts permit very general statements to suffice, such as "fundamental disagreements" or a "breakdown in the attorney-client relationship." However, if the motion is thereafter denied or the court orders that the attorney explain (which it might if trial is pending) the lawyer still has to take care in revealing further information and can, in most jurisdictions, can ask that the facts be considered ex parte and under seal or that they be considered by a judge other than the trial judge.

Q. The next step in the story was the attorney being subpoenaed to testify as to the identity of the witness and McKinnon moves to quash the subpoena. McKinnon believed that her ethical duty required her to raise the privilege. However, the court determines that the attorney had the discretion to report the former client's intent to commit a crime (perjury) in order to prevent that crime. Besides which, she had already disclosed information about the planned perjury. So why doesn't that resolve the issue of privilege? By making the disclosure she did in her withdrawal motion, hadn't she already waived the privilege?

A. This question helps students to differentiate privilege and ethical duty (once again) and see how important it is to separate the two for purposes of analysis. If students are struggling, direct them toward note 2 following the case.

Q. The attorney refused to testify and was held in contempt. Why is this contempt? Would this be considered civil or criminal contempt?

A. I like to make sure students understand the basics of contempt, since it is an important component of attorney regulation that is rarely covered elsewhere in the curriculum, so I take the time to have the students revisit what they have learned about the topic in section 2.6 on page 41-42. They should be able to identify this as contempt because it violates a court order and civil contempt because the sanction was coercive.

Q. Consider her refusal to testify. An attorney has an ethical duty to raise the privilege if it applies but an attorney need not go to jail for her client because Rule 1.6 provides an exception to comply with court orders. As the text on page 251 reminds students, "Exceptions to the ethical duty of confidentiality that permit disclosure when required by law keep attorneys from finding themselves in the dilemma of choosing liability or discipline." Why do you suppose this attorney was so determined to avoid disclosure?

A. I'm not sure what the answer to this question is but the students always have some interesting theories, including ignorance (thinking she had an ethical duty to continue to refuse to testify even in the face of a court order); principled judgment (she knew her interpretation was right); guilt (she believed that she'd already broken the rules through her withdrawal motion and didn't want to make it worse); loyalty (making a point about the relationship between the prosecutor's office and the public defender), and defense strategy (wanting to set up an appeal in the most dramatic possible terms).

Q. The appellate court adopts Rule 3.8 criteria as a mandatory procedure for a judge to consider before issuing a subpoena against an attorney. Think for a moment about this use of the Rules of Professional Conduct. Revisit note 20 in the Model Rules Preamble & Scope section, which is designed to limit the use of the rules outside the context of disciplinary matters. Do you think the court's reliance on the rules is in keeping with the spirit of this limitation?

A. This question gives students the opportunity to consider the special role of a prosecutor and recognize that courts have a special obligation to regulate prosecutorial conduct and the use of their own proceedings. That purpose is closer to disciplinary purposes (protection of the public and judicial system) than the examples that note 20 provides (allowing the rules to be used as weapons for liability or punishment).

Q. The Kansas statute provides that the judge shall quash the subpoena if the privilege applies but may order an appearance if there is a substantial need for the information and if alternative methods of gaining the information would impose undue hardship. Does this latter language sound familiar to you?

A. Students should recognize that the "may" part of the statute sounds very much like the basis on which one can overcome the work product privilege. This is a good point at which to reinforce the significant difference between attorney-client <u>privilege</u> and work product <u>protection</u> in terms of ability to overcome the objection.

Q. How does the court resolve this difference in language in the statute?

A. Students should recognize that the court reads the statute's permission to compel

appearance as inapplicable to privilege, which cannot be overcome by need (page 248 mid-page).

Q. What about the crime/fraud exception to privilege. Clearly perjury is a crime and McKinnon had a firm factual basis for knowing that her former client was planning a crime and she talked to McKinnon about that in the course of the legal representation, so what's missing to make the crime/fraud exception apply?
A. The former client hadn't yet committed the crime!

Q. What's the difference then between the crime/fraud exception to privilege and the older ABA Model Code of Professional Responsibility's crime/fraud exception to the duty of confidentiality?
A. Apart from the general differences between the evidentiary privilege and the ethical duty (when they apply, communications v. information, etc.) the exception to the ethical duty permits discretionary disclosure regarding future or ongoing crimes/fraud whereas the exception to privilege permits compelled disclosure regarding past crimes/frauds. Both require that the information/communication be gained as part of the legal representation.

5. Required by Law & Research Reporting
(Section 11.5 and Research Assignment 11-A, pages 250-52; Outcomes 11-a and 11-c)

If you assign Research Assignment 11-A, you can ask students to report on their findings regarding mandatory reporting of suspicion of child abuse.

A rubric for grading this assignment could include the following criteria:

1. Did the student recognize that the duty of confidentiality is the starting point for analysis of the application of any statutory duties? Did the student keep the distinction between privilege and ethical duty clear and recognize that, because this is a question of voluntary disclosure, privilege is not the relevant standard? Did the student recognize that the 1.6(b)(6) exception is what permits reconciliation of statutory reporting requirements with the ethical duty?

2. Did the student research statutes for duties that arise when one suspects child abuse? Did the student analyze (and preferably research) to determine whether attorneys fall under the mandated reporting statute?

3. Did the student research statutes for duties that arise when one possesses child pornography? Did the student analyze what the attorney's duty would be regarding the photographs that may be in his or her possession?

4. Did the student analyze Rule 1.6(b)(1) exceptions that would permit but not require disclosure in order to prevent harm to the client's daughter. In particular, did the student analyze (and preferably research) whether child pornography presents a significant risk of "reasonably certain … substantial bodily harm"?

5. Did the student analyze the collateral duties, in terms of counseling the client and withdrawal, raised by the decision to disclose?

Here is a sample answer, using Missouri's statutes (which are fairly typical):

What do you do with the information about the child abuse and possible child pornography? Must you report the information to anyone?

We begin with an analysis of duty. Rule 1.6 would require that the attorney keep confidential the information about the photos and the client's statements because this is all "information relating to the representation." That the photos are available on the internet does not make them less confidential.

The question then is whether an exception to Rule 1.6 applies. Rule 1.6(b)(6) provides that an attorney may disclose confidential information in order to comply with other law. That "other law" might be R.S. Mo. §210.115, which mandates reporting of suspected child abuse. 210.115(1) includes a very specific list of mandated reporters, from which attorneys are notably absent. The list includes "other person with responsibility for care of children." As the attorney for Mother, it is unlikely that you are within this definition, as your "care" is for the client. There is an argument that your represent Mother in her capacity as a parent, with a duty to the child implicit in that representation and in the standards for custody of "best interests of the child" but it is a stretch in these circumstances.[46] Recall that the regulation of attorneys in Missouri, as in most states, is in the sole and exclusive authority of the state courts. So even if the statute did make attorneys mandated reporters, that statute could not override the ethical duties. The only reason the statute is relevant is because Rule 1.6(b)(6) provides an exception to the duty to comply with "other law."

§210.115(5) permits discretionary reporting of "actual or suspected abuse or neglect" if there is "reasonable cause." The law's permission to report does not override your duty of confidentiality under Rule 1.6. For you to have discretion to report would require that an exception to Rule 1.6 applies. One would be the 1.6(b)(1) exception for circumstances in which you reasonably believe it is necessary to disclose to prevent reasonably certain death or substantial bodily harm. There is an issue as to whether child pornography will lead to "reasonably certain… substantial bodily harm." However, a little research reveals what seems intuitively obvious: even without direct physical injury, child sexual abuse, include pornography, presents such significant risks of psychological trauma that translates to substantial bodily harm as to meet the standard.

Not only does the discretionary reporting permission under R.S. Mo. §210.115 not override confidentiality, its requirements are not entirely consistent with the discretionary

[46] Many attorneys who are appointed by the court as Guardians ad Litem believe that they do fall within this definition and maintain that they have a duty to comply with these reporting requirements. Accordingly, there is not a duty to report under "other law."

exception under Rule 1.6(b). Under the Model Rule, disclosure is both voluntary and prospective. Unlike reporting laws which require people to report suspected cases of past (and potentially continuing) abuse, the ABA Model rule allows the attorney report future conduct if the attorney "reasonably believes" will prevent to "reasonably certain" substantial bodily harm. The state statute's standard of "reasonable cause to suspect" is a much lower standard of scienter than the ethical exceptions.

Some students might have analyzed §210.140, which provides that the child abuse statutes do not abrogate the attorney-client privilege. While this provision is additional evidence of the primacy of your ethical duty to your client, it is essentially irrelevant to the analysis here. First, your knowledge of these pictures is not privileged as it is not a communication between attorney and client. Second, regardless of whether the privilege applies (indeed even if the statute stated an exception to attorney-client privilege), the duty of confidentiality is what would govern in this instance as you are not being called to testify or provide evidence under oath, which is the circumstance in which the privilege applies.[47]

Finally, there is the problem of the photos themselves. If the attorney viewed these photos on his own computer, they are now physically in the computer (in the web browser's cache). If this material is child pornography, the attorney is now in possession of contraband. A variety of state and federal laws prohibit possession of child pornography. For example, it is a crime for anyone to knowingly possess or transfer contraband, which includes child pornography. 18 U.S.C. § 2252 (2012). Likewise, R.S. Mo. §573.037. 1 provides that "A person commits the crime of possession of child pornography if such person knowingly or recklessly possesses any child pornography of a minor under the age of eighteen or obscene material portraying what appears to be a minor under the age of eighteen." So the attorney would be violating the law simply by having downloaded the photos. The answer cannot be to simply delete the photos, as that presents the risk that you will be considered to have destroyed evidence. Rather this provides a good example of a situation in which the attorney must turn over the contraband, even if the attorney does not wish to exercise the discretion to disclose the information.

In doing so, the attorney must still protect his client's confidentiality, so he would be required to turn over these photos with no information about how or why he discovered them. There is even some question as to whether he could indicate that he is aware of who the persons in the photographs are, as to reveal that information would be to disclose confidential (and, incidentally, privileged) information.

In sum, the attorney has several choices to make:

[47] Even if the privilege did apply, one could argue that the crime-fraud exception would apply here as the client has asked for your assistance to commit a crime (that is, fail to protect her child from abuse).

First, the attorney has a duty of competence and communication that would require informing the client that allowing the boyfriend continued access to the child might cause her to be charged with crime and would jeopardize her custody action. He also would have a duty to inform her of his obligation to turn over the photographs to the police.

Beyond that, he has several choices. He could decide to do nothing further regarding Mother's statements. He may decide that's the right moral move if he believes the Mother will indeed protect the child; but even if he doesn't believe Mother, he has no legal obligation to report. On the other hand, he could invoke the 1.6(b)(1) exception and report the child abuse. Unless he believes that counseling the client about this option would cause greater harm, he should first try to get the client to agree do this herself. As leverage in that discussion, he can use the threats of his asking for leave to withdraw, of his obligation to turn over the physical evidence, and of his right to file a child abuse report with the state.

If attorney does report, he will likely be required to withdraw, since going against both the client's wishes and interests places him in a conflict of interest situation and makes it impossible to continue to represent and communicate with the client competently. The attorneys may decide that it is not as helpful for him to report but it would still be important for <u>someone</u> to report. Suggesting, for example, that Mother take daughter to a psychologist for counseling would place this information in the hands of a mandated reporter. To do so without informing the client of those consequences would be to deceive a client and would not be consistent with the spirit or letter of Rule 1.4 or 8.4.

6. Closure: Test Your Understanding Problems

Errata:

Questions 1 & 2 in the Test Your Understanding problems on page 252 at the end of Chapter 11 are meant to be problems for review of Chapter 10. Therefore I provide the answers above in that Chapter's materials under Classroom Learning Section 5

Problem 3, page 252, can make an effective closure problem. It requires students to recognize that the ethical duty and the privilege both survive death and that obtaining post-mortem consent to disclosure is tricky. It should emphasize the importance of researching their jurisdiction's laws regarding who can give that consent. They should be able to explain how the issue of privilege would arise (e.g. a motion to quash the subpoena or an objection when asked questions). They should recognize that the objection is unlikely to succeed if the attorney has the sought-after information independent of attorney-client communications (in which case no privilege applies) or if the only communication sought is the identity of clients (unless that would provide a link in a chain leading to criminal activity).

Unit Three Review

This is a short unit and all the doctrine will be reviewed throughout Unit Four; nonetheless, for effective learning of the next unit it is critical that students understand the basics presented in this unit. Encourage the students to complete the chart on page 254 (the completed chart is provided on the next page) and to review the multiple choice questions and answers. This would also be a good point for the students to return to the pre-test on page 180 to see if they are more confident in their answers.

Unit Four Preview

The Pre-test can help students to consider how strongly they value the adversarial role. You can use the pre-test as such, waiting to provide the answers to students until they have completed the unit or providing the answers nonw as a way of providing an overview of the unit.

Of the statements in Question One, which place the attorney's duty to the public on a scale from attorney as enforcer to attorney as counselor, the most accurate statement is D, which restates Rule 1.2(d). Statement A would place attorneys in a position of policing their clients. B and C require attorneys to censor their advice depending on their perceptions of the client's intent.

Question Two provides the same choices regarding candor to the tribunal. The most accurate statement is C, which students should recall from the prior unit. A is not correct because the attorney must "know" not merely believe. B would require attorneys to behave in ways that are quite the opposite of the adversarial system. It is true as to certain attorneys (e.g., prosecutors) or in certain proceedings (e.g., witness lists). The statement reaches too broadly to be true however. D confuses a plea with a factual statement. E is too broad a statement of the attorney's obligation to reveal legal authority.

Question Three examines the duty to the adversary. It may surprise students to discover that statement D is the most accurate statement of the rules, being Rule 4.1(a). Statement A is one that many students will presume to be the most accurate; however, it is too aggressively adversarial to be the most accurate statement. Statement B is too far in the other direction, presuming a duty of cooperation that all but destroys the premise of the adversarial system. Statement C would make negotiations unethical, since most negotiations involve an exchange of important rights for money. Statement E is Rule 4.1(b) without the exception for confidential information.

	Confidentiality	Privilege
Purpose	To protect the client from an attorney's disclosure.	To protect the attorney-client communication from compelled disclosure.
In what legal context does this doctrine come up?	Any time an attorney uses or reveals client information	Compelled disclosure in trial, discovery, government investigations, or other situations in which third persons seek access through the subpoena power.
What information is protected?	All information related to the representation.	Private communications between privileged persons for the purposes of securing legal advice or representation.
Who can consent and how?	Client Expressly or impliedly	Only the client has the authority to waive the privilege; however, the attorney as the client's agent has the power to do so.
When does the protection begin and end?	Begins when an attorney receives information relating to a representation. Does not end.	Begins when an attorney communicates with a client or potential client for the purposes of the client securing representation or legal advice. Does not end, though may be waived.
What disclosures destroy the protection?	None	Voluntary disclosures to non-privileged persons waives privilege as to the communication disclosed. Some involuntary disclosures may waive privilege. An attorney's discretionary disclosure under a 1.6(b) does not waive privilege.

What is the exception for dangerous clients?	Attorney has discretion to disclose information that could prevent death or substantial bodily harm.	Privileged communications can be compelled if the communications relate to a crime or fraud that the client has committed and the client sought the lawyer's advice in order to further that crime or fraud or actually used the attorney's advice to advance the crime or fraud.
What is the exception for fraudulent clients?	Attorney has discretion to disclose information that the attorney reasonably believes would prevent or rectify the consequences of a client's future or ongoing crime or fraud causing significant financial or property harm if the attorney's services were used.	Privileged communications can be compelled if the communications relate to a crime or fraud that the client has committed and the client sought the lawyer's advice in order to further that crime or fraud or actually used the attorney's advice to advance the crime or fraud.
What is the self-defense exception?	Attorney has discretion to disclose information to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.	Attorney-client privilege does not apply to a communication relevant to an issue of breach of duty by the client to his lawyer.

I have enjoyed using "The Honor Code" episode of The Practice for a Unit review. The episode is based on the famous *Spaulding v. Zimmerman*, 116 N.W.2d 704 (Minn. 1962). If you have a copy of the show, I would be happy to send you the notes.

Chapter Twelve: Confidentiality and the Duty of Candor to the Court

Outcomes, Assessments, and Assignments

Outcome 12-a: Reading and Analyzing Lawyer Regulation 

Students should be able to define key terms and apply both ethical rules and rules of procedure regarding the duty to be truthful to the court in pleadings and evidence. They should be able to identify the circumstances in which an attorney has a duty to disclose confidential client information in order to comply with the duty of candor and describe reasonable remedial measures required by Rule 3.3.

Reading Assignment:

Chapter 12.

This class is about the point in the course at which students begin to make connections between (or to confuse) standards for disclosure, withdrawal, or communication. Reminding students to review the rules cited at the beginning of the chapter can help them to keep straight the standards for candor and confidentiality that are the focus of this chapter.

Assessment:

Student responses to question 2 on page 260 can highlight basic understandings of the duty. Completing the chart on page 265 can also assess basic knowledge. Problems and exam questions that introduce greater ambiguity in intent and knowledge can assess higher levels of mastery of this concept.

Outcome 12-b: Communication Skills 

Students should be able to demonstrate methods of persuading clients to be truthful.

Reading and Practice Problem Assignment:

Section 12.3 of Chapter 12 (pages 279-283). Problem 12-A (pages 283-84).

Students appreciate having the opportunity to role play client counseling situations or to watch these roles being played out, as it provides necessary context for discussion of the rules.

Assessment:

If you wish to target this outcome for assessment beyond simple knowledge, a client letter or client counseling session would be the most effective method of assessing the students' abilities to translate this knowledge into practice. The problem in the next chapter, on capitalizing on an opponent's error, has an entire client file if you wanted to really expand the counseling instruction. Otherwise, it's helpful to simply have one student demonstrate trying to talk a client out of lying. It really helps students see that the discretion built into the rules permits attorneys to use the threats of withdrawal and disclosure as tools to convince their clients to do the right thing.

Outcome 12-c: Researching Issues in Professional Responsibility ⓘ

> Students should be able to research judicial application of rules of procedure that govern candor to the court, and be able to evaluate whether cases are interpreting a current version of a rule.

Assignment:

Research problem page 288 (Bob Borrower).

Assessment:

Students should be able to locate their local rules of conduct as well as their state's version of Rule 11 and any cases interpreting its application to pleading in the alternative.

Suggested Classroom Learning Activities

1. Set Up: Perspectives on Candor to the Tribunal

(Chapter 12; Outcome 12-a)

There are many intensely personal and theoretical questions posed in this chapter, any one of which can make a good ice-breaker for a rich discussion. A good place to start on this chapter is to ask the students how they would respond to this question, commonly asked by the public: "How can a lawyer defend a "guilty" client?" The discussion will inevitably center around two themes: one is the epistemological question (including the issues of false confessions, eyewitness unreliability, cognitive bias, etc.) and the other is the systemic question (the importance of criminal procedural due process protections and the role of defense counsel in an adversary system). This can make an excellent threaded discussion list topic or guest speaker presentation (see below).

A second place to begin is with the balance between candor and confidentiality. Remind the students that the balance between loyalty to the client and candor to the tribunal has been weighted differently over time and by different states. Some provide that an attorney may not disclose a client's perjury, and others, like the Model Rules, require disclosure if that would constitute a reasonable remedial measure. Elicit student opinions on which they think is the best balance.

2. Problem Discussion:
(Preliminary problem, page 262, Outcome 12-a)

This problem can be used to frame discussion of nearly the entire chapter. In particular, it can be used to emphasize the shifting duties under Rule 3.1 and 3.3 that arise at various stages in a representation and to emphasize the interactions between the rules of professional conduct and other laws such as malpractice and rules of procedure.

Q. What rules and law help us determine whether we can simply accept the client's statement or whether we need to do additional investigation?
A. This question will raise much of the materials discussed in part 12.4 False or Frivolous? The rules of professional conduct give very little guidance regarding the duty to verify a client's story. Students should identify rules 1.1 Competence and 1.3 Diligence as one place to start; however, this is another good place to emphasize that the role of other law outside the rules of professional conduct is likely to provide as much if not more guidance. Generally factual investigation is a core duty of competence. The failure to adequately investigate, discover, or secure assets of the opposing party is one of the most common bases for legal malpractice in domestic relations cases. *Grayson v. Wofsey*, 646 A.2d 195 (Conn. 1994); *Baldridge v. Lacks*, 883 S.W.2d 947 (Mo. Ct. App. 1994); *Callahan v. Clark*, 901 S.W.2d 842 (Ark. 1995). It would seem logical, then, that the attorney should exercise a good deal of care in investigating the client's assets and income.

Particularly in this type of action, since this question arises in the context of litigation and the facts must be asserted in a court pleading, Model Rule 3.1 and Civil Procedure rules such as Fed. R. Civ. Proc. 11 apply. Call students attention to comment 2 to Rule 3.1, which indicates that lawyers must "inform themselves about the facts of their clients' cases and the applicable law." Ask students to identify the standards of investigation provided by Rule 11 of the Federal Rules of Civil Procedure or a state counterpart to that rule: "an inquiry reasonable under the circumstances."

Again, whether considering the rules of professional conduct or rules of procedure, the test is ordinarily going to be one of objective reasonableness. Ask student to identify the factors that make a failure to investigate more or less reasonable:

- Information the client has provided is "inconsistent, suspect, or materially incomplete." ABA Comm. on Ethics and Professional Responsibility, Formal Op. 335 (1974).
- The matter is complex and the consequences significant (comment 2 to Rule 1.1).
- The client's conduct or assertions raise questions of fraud or criminal conduct. ABA Informal Ethics Op. 1470 (1981). (Call students' attention to the statement in the text on page 287: "You may not ignore signals that would give an objective attorney reason to doubt.")
- The nature of the legal or factual claims and the ease of obtaining objective verification. Income and expenses can ordinarily be verified. Cash transactions are more difficult but may, by their very nature, raise more suspicions that might trigger a greater duty to investigate.
- Your relationship with your client. If this were a long-standing client whose overall conduct caused you to conclude generally that he was honest in his reporting, relying on his assertions alone would be more objectively reasonable.
- The time available. Here, since there is not a statute of limitations issue to contend with, there is little time justification for proceeding without further investigation.
- Finally, because statements of income and expense in these actions in most states must be verified by the client, penalties of perjury would apply to a knowing material misrepresentation.

Q. What rules govern if you discover that your client is lying about income and expenses before either you or the client have made any representations to anyone else?

A. The general rules are Rule 1.2(d) and 1.4(a)(5), which would require that you communicate with your client about the consequences of misrepresenting income and expenses and the fact that you cannot help to further the lie. Rule 2.1 would permit you to use a broad range of advice to talk the client into doing the right thing, and Rule 1.16 would require withdrawal if you know that you could not continue the representation without assisting in the fraud or would permit withdrawal if you reasonably believe your client will continue to lie about income and expenses. Finally, some students will note that the general standards of Rule 8.4(c)&(d) might apply as assisting the client in this misrepresentation would be to engage in conduct that involves dishonesty and that is prejudicial to the administration of justice.

Q. What rules apply if you learned this after you have already submitted a draft statement of income and expenses to the opposing party and the couple will be entering mediation based on these numbers?

A. The same rules above would require communication with the client and efforts to convince the client to fix the problem. The question raises the additional issue of whether appearing before a mediation would trigger the responsibilities of Rule 3.3. The issue is addressed in the comments in the text on the structure of Rule 3.3, at page 265. However, as noted there, even if 3.3 does not apply, Rule 4.1 would apply, which will be the subject of the next chapter.

Q. What rules apply if you learned this after you had already filed a statement of income and expenses with the court?
A. Here, clearly, Rule 3.3 would apply and would require reasonable remedial measures. Remind students that Rule 1.6(b)(6) permits disclosure to comply with other law or a court order

Q. What rule applies if you had not learned the truth of your client's income until after the court had ruled on the modification motion?
A. This question raises the question of the endpoint for Rule 3.3 duties. The comparison of the Ohio endpoint with the Model Rule endpoint (discussed in the text at page 265) can be useful for highlighting the uncertainty that can arise here. That uncertainty is even greater in the context of a family law proceeding, where courts retain jurisdiction over child support orders until the child is emancipated. (This is also the question addressed by problem 3, page 266, though in that problem the answer is much clearer, because a criminal action has a clearer endpoint. Right after the jury comes in with a verdict is not the endpoint, of course, because judgment has not even been entered and the time for appeal has not passed.)

3. Dissecting Rule 3.3
(Section 12.1, pages 262-67; Outcome 12-a)

The key lines students must struggle through in reading Rule 3.3 provisions regarding false evidence are three: knowledge/belief, false/misleading, material/immaterial. The chart on page 265 presents a graphic approach to addressing each of these differences.

Here are some questions you might use to focus attention on these key terms:

Q. Rule 3.3 identifies several situations in which an attorney might "know" about false statements or evidence. Some of these would occur before that false statement or evidence is submitted to the court. What are the attorney's duties in these circumstances?
A. Don't offer; do what you can to prevent it being offered;
don't make a false statement of fact or law (Rule 3.3(a)(1));
don't offer evidence you know is false (3.3(1)(3)); and
if you know that someone (anyone) intends to engage in criminal or fraudulent conduct related to the proceeding (including perjury), take reasonable remedial measures to remedy the situation (Rule 3.3(b)).

Q. The key to all of these is "know." How does an attorney know what another person intends? How does at attorney "know" that evidence is false? What if he only suspects? See Questions 1 and 2 on page 266.
A. Remind the students that the line of knowledge v. belief is the same line discussed in the *McClure* case in the prior chapter (page 234-39) and it bears revisiting here. Students should

once again refer to Rule 1.0's definitions to find the somewhat fuzzy line between know and believe. Students likely have debated this line in criminal law study of scienter requirements, but it bears further discussion here. From a philosophical standpoint, knowledge is objective truth whereas belief is based on speculation on that about which one does not or cannot obtain sufficient knowledge to be certain of objective truth. Or, as Socrates would have it, one can have false beliefs but not false knowledge. Plato, GORGIAS 31 (Penguin Classics ed., 1960). However, philosophical distinctions are less useful to students in determining when they have crossed the line from suspicion to knowledge to belief as students define for themselves where these lines cross. Students will often opine that direct, concrete, consistent, and corroborated information as more likely to add up to knowledge than information from which one much draw inferences or make credibility determinations. Other students will make analogies to burdens of proof: from preponderance of the evidence to beyond a reasonable doubt. Justice Stevens concurrence in *Nix* (page 274) poetically describes the shifting sands of "knowledge" making an important case for deference to the judgment of the attorney without using the benefits of hindsight and equally emphasizing the position of the Model Rules in comment 8 to Rule 3.3,which suggests that attorneys should resolve doubts in favor of the client. Directing students to the psychological literature that suggests the limits of our ability to detect lies (section 12.3, pages 279-83) is important in this context.

Ask students when they would feel confident that they knew the client was not telling the truth in the questions on page 266.

Q. Suppose an attorney realized that he has already submitted false evidence. What is the difference in the attorney's responsibility if false evidence is material or immaterial?
A. Compare MR 3.3(a)(1) and (3). If the attorney makes a false statement, it doesn't matter if it is material, the attorney must correct the statement. If an attorney knows evidence is false, he can't submit the evidence, and it doesn't matter if it's material or not. But if an attorney discovers that she, her client, or her witness have submitted false evidence, she only has to do something about it if the evidence is material.

Q. A key element to both parts of the rule is materiality. What is material evidence?
A. Testimony is material if it has "a natural tendency to influence" or "is capable of influencing" the tribunal to which it is addressed with respect to "any proper matter of inquiry." *United States v. McKenna*, 327 F.3d 830, 839 (9th Cir. 2003) (*quoting United States v. Leon-Reyes*, 177 F.3d 816, 820 (9th Cir. 1999).

Q. Rule 3.3(a)(3) and 3.3(b) both impose a duty to take reasonable remedial measures. 3.3(a)(3) requires that the attorney address "false material evidence" and 3.3(b) requires reasonable remedial measures to address "criminal or fraudulent conduct related to the proceeding." How do these two compare in terms of when the duty arises?

A. The duty to remedy false material evidence only applies if the attorney, the attorney's client, or the attorney's witness offered the evidence, whereas the duty to remedy criminal or fraudulent conduct applies to any person's conduct.

Q. Isn't the duty under Rule 3.3(a)(3) just a subset of the duty imposed by Rule 3.3(b)? Isn't submitting false material evidence always a crime or fraud on the tribunal?

A. No, both crime and fraud require intent to make a false statement. One could submit false material evidence as a result of confusion, mistake, or faulty memory, or without knowing or believing that it was false and without an intent to deceive. (See *Montano* case cited in question 1, page 266). For example, see the definition of perjury on page 264. The elements of perjury are (i) oath; (ii) intent; (iii) falsity; and (iv) materiality. Courts interpreting these elements require both knowledge of falsity and intent to mislead. Intent can be measured by "context of the questioning and circumstances surrounding the investigation." The Supreme Court has stated that the "literal truth" is a defense to perjury arising out of answers to cross-examinations, emphasizing the duty of the attorney to ask questions that will elicit precise responses. Even if the witness is being intentionally evasive, "it is the lawyer's responsibility ... to bring the witness back to the mark, to flush out the whole truth with the tools of adversarial examination." *Bronston v. United States*, 409 U.S. 352, 360 (1973).

Lawyer's Awareness	Perjury	False Material Evidence	Misleading Material Evidence	Misleading Immaterial Evidence
Know	Doesn't matter who; Must not assist; Must take reasonable remedial measures	Must not offer; Must take reasonable remedial measures if self, client, or own witness submitted		Must not offer; Need not remedy
Believe	May refuse to offer	May refuse to offer		May refuse to offer
Suspect	Investigate and communicate	Investigate and communicate	Investigate and communicate	No duty

4. Refusing to Offer False Evidence: Case Discussions

(Nix v. Whiteside and United States v. Long, pages 262-75; Outcome 12-a)

These cases are helpful, not only in understanding Rule 3.3, but in discussing the broader questions of the balance of candor to the tribunal and loyalty to the client.

Nix v. Whiteside Discussion

Q. Would Robinson "know" that Whiteside was lying when he hadn't admitted that he thought that he needed to say that there was a gun?
A. Students will disagree. Some will say that it was clearly a lie, even without the statement about "Howard Cook's case," given the consistency with which Whiteside had been saying he saw no gun previously and the absence of any other evidence of a gun. Others might argue that saying he saw "something metallic" isn't the same as saying he saw a gun and this might have been a detail he had omitted before. These students might argue that any reasonable doubts have to be resolved in favor of the client. However, it seems unlikely that, without some plausible explanation for the change in story, that the shift in story alone in this context would be enough for most people to "know" that the statement is not true.

Q. The evidence here was enough to reasonably believe the story was not true. Why didn't Robinson refuse to call Whiteside as a witness?
A. Maybe because his testimony was his only defense but more likely because Whiteside wanted to testify and, in a criminal case, the defendant has a constitutional right to testify.

Q. The Court notes that a strong presumption of effectiveness applies, such that breaches of ethical standards do not necessarily create a denial of effective assistance. They suggest that to do otherwise would be to "constitutionalize" standards of professional conduct and "intrude into the state's proper authority to define and apply" those standards. In what way would courts be intruding into state authority by holding that a violation of a rule of ethics would be ineffective assistance? Wouldn't such a holding support state regulation by giving it greater weight?
A. The problem is one of time and interpretation. If the Court were to hold that a violation of a particular rule were part of the constitutional definition of effective assistance of counsel, the states would have a hard time thereafter changing either the rule or its interpretation in a different way. Given the variety of approaches to the issue of candor to the tribunal and of confidentiality, this is not small concern.

Yet, unless the Court holds that any IIAC claim is limited to its own facts, the Court will necessarily be setting constitutional standards for defense conduct, so it seems difficult to avoid the problem of setting constitutional floors on conduct.

Q. What does the majority suggest are "reasonable remedial measures" if an attorney knows that their client has or will commit perjury?
A Refuse to assist (by not asking the questions that will elicit testimony),
Remonstrate with the client to deter their plan,
Repair the perjured testimony if possible, or
Report the perjury to the court.

Q. What is the point that Justices Brennan and Stevens are making about this aspect of the majority's opinion?

A. That there are a many open questions regarding whether an attorney "knows" his client is going to commit perjury, what the proper response should be in all those instances, and, most importantly, what the attorney must do if the client has testified in a way that the attorney believes is perjury. Justice Brennan reminds us that all the court's opinion regarding these questions are *dicta* and Justice Stevens reminds us why the answers are not so simple.

United States v. Long

The defendant in this case appealed his conviction raising, among other arguments, a claim of ineffective assistance of counsel. The Court of Appeals confirmed the conviction without prejudice to the defendant's ability to raise the argument in a collateral proceeding so that an evidentiary hearing could be held.

The first margin question asks whether withdrawal alone would have solved the attorney's problem. Students are quite willing to believe that withdrawal is an easy, costless solution for attorneys. Helping the students to recognize that the attorney may feel a personal or professional obligation (apart from what the rules require) to prevent the perjury and that withdrawal is rarely as simple as "I withdraw" and nearly always will telegraph some kind of a message regarding the client. Moreover, the chances that the court would have permitted the withdrawal this close to trial were slim. Finally, it seems unlikely that withdrawal may have remedied the client's intent to perjure himself, even if the court would have granted the withdrawal.

Note 1 (page 278) after the *Long* case, contrasts the "firm factual basis" test established in Long with a variety of other standards for the level of an attorney's knowledge necessary before the attorney can and must reveal perjury to the court. Asking students to choose and defend one of these standards can raise the underlying policies in tension.

Question 3's speculations about what the evidentiary hearing might look like following the *Long* case is designed to emphasize to the students the importance of documentation when dealing with a client whom they believe will lie.

Question 4 deals with the situation of a client who intends to violate a court order. Model Rule 3.3 would require an attorney to disclose a person's intent to commit a crime that is "related to the proceeding" (as in jumping bond). Again, the question here would be whether the attorney really knew the client did not intend to appear. Certainly, the attorney was violating the rules by asking for a continuance on the basis of a scheduling conflict because that isn't the real reason. Saying that the continuance was to "secure a witness" is literally true, but the problem becomes

the attorney's reputational cost for engaging in this quibble. The attorney could ethically choose to show up at the hearing and, if the client did not appear, move to withdraw.

5. Using Videos
(Section 12.2 Questions pages 277-79; Outcome 12-a)

The questions in this chapter are best framed by concrete facts and videos can be very effective is setting up the context. Lying clients are the stuff of great courtroom drama of course. Note 2 page 278 asks about the narrative testimony form. A delightful episode of "The Practice" (The Dog Bite) gives an entertaining example of this approach (http://www.imdb.com/title/tt0677750). The attorney's revealing the need for narrative and the judge's explanation to the jury is at 24:31 and takes less than a minute to show. The client's actual testimony is pure Hollywood and is, of course, effective. If you have time for the entertainment, that portion of the show is at 30:24-32:05.

Question 6 on page 279 asks about the gimmicks that attorneys are sometimes given to trying. A useful question to ask the students is along the lines of "What were they thinking?" which can lead to a discussion of the necessary limits of advocacy. "The Dog Bite" episode of The Practice, previously mentioned, also has such a trick. Courtroom antics are, of course, easily found throughout legal-themed television.

6. Professional Responsibility Skills: Counseling a Client for Candor
(Section 12.3, Problem 12-A, pages 279-84; Outcome 12-b)

Section 12.3 provides practical advice regarding methods to encourage clients to be truthful and to detect when they are not. This section can be used in conjunction with the preliminary problem or with problem 12-A on pages 283-84 in asking students how they might work with clients to establish trust and discover the truth. Asking students to demonstrate some of the techniques described in this section is more effective than asking them to simply list these techniques.

7. Guest Speakers
(Chapter 12; Outcome 12-b)

Since many of the most difficult questions raised in this chapter find the greatest tension in the context of criminal representation, this can be an excellent chapter to review using guest speakers. A panel of prosecutors, defense attorneys, or a combination can be invited to reflect on some of the key questions from the chapter. These might include:

1. For defense attorneys, "Do you want to know the truth?" (Note 2 on page 283 asks students to react to the position taken by some defense attorneys that they don't want to know what happened they only want to know what can be proven).

2. For defense attorneys, "How do you answer people when they ask whether it bothers you to defend people whom you know are guilty?"

3. For prosecutors, "Must you personally believe a defendant is guilty before you prosecute a case?" Question 5 on page 279 relates Rule 3.3 to prosecutors and reviews the portions of Rule 3.8 relevant to the prosecutor's duty to the system. Professor Gershman's article, cited in the question, begins with his own experience as a prosecutor, in which the office policy was that one never should prosecute a case unless personally convinced of the guilt of the defendant, and contrasts this viewpoint with that of other authors who maintain that prosecutors should not bring their own personal belief regarding innocence to the question. The example he uses involves a one-witness identification case in which he was not convinced of the reliability of that witness.

4. Does a prosecutor have a higher duty to pursue truth than other attorneys? Professor Gershman, in the article cited on page 279, posits that a prosecuting attorney has a duty to pursue truth and cites several categories of conduct that are inconsistent with that duty including:

> (1) distorting the truth by attacking the defendant's character, misleading and misrepresenting facts, and engaging in inflammatory advocacy;
> (2) subverting the truth by making false statements and presenting false evidence;
> (3) suppressing the truth by failing to disclose potentially truth-enhancing evidence or obstructing defense access to potentially truth-enhancing evidence; and
> (4) other truth-disserving conduct that exploits defense counsel's misconduct and mistakes and prevents introduction of potentially truth-serving defenses.

Bennett L. Gershman, *The Prosecutor's Duty to Truth,* 14 GEO. J. LEGAL ETHICS 309, 315 (2001).

8. Researching Sanctions

(Research Problem 12-A, page 288, Outcome 12-c)

Students should be able to research judicial application of rules of procedure that govern candor to the court, and be able to evaluate whether cases are interpreting a current version of a rule. Researching cases interpreting the federal rule, the students should find the general rule that, although Rule 11 requires that a party make a good faith effort to determine the facts before pleading hypothetically, it does not preclude hypothetical pleading. However, each separate claim must meet the standards of Rule 11; that is, as to each claim, after a reasonable inquiry, the pleader must legitimately doubt the facts or legal theories. *Kwan v. Schlein*, 246 F.R.D. 447 (S.D. N.Y. 2007).

7. Closure: Review Problems

(Test Your Understanding Problems, pages 288-91)

Each of these review problems provides a sample answer and analysis for students' self assessment. If you wish to give students an additional problem for their practice, I have found the following problem especially knotty and effective:

On April 30th, Joseph C. Koellen made his last will and testament under which he appointed John H. Wille to be executor. In January of the next year, as his health was failing, Koellen entered into a contract with Anthony H. Lampe and Blanche A. Lampe for them to move into his home and provide for his care. Three months later, on March 10th, Koellen died. Shortly thereafter Wille presented the will of April 30th of the prior year, for probate.

Harold Forbes is an attorney who has an estate planning practice in Eureka, Kansas. On March 11th, the day after Koellen's death, Anthony H. Lampe called at Forbes' office and requested his representation in a probate matter. He explained that Mr. Koellen had made an arrangement with the Lampes to care for him and in exchange, he would leave them his house and car when he died. Mr. Lampe presented a document which contained signatures of Anthony H. Lampe, Mrs. Lampe, Joseph C. Koellen, Guatney and Beatty.

Forbes agreed to represent Mr. Lampe in the matter. He studied the document and researched the law on contracts to make a will and concluded he could not succeed for Lampe. He called Lampe advised him that the contract was simply a contract and explained why it did not meet the requirements of the law for it to qualify as a testamentary document. Forbes returned Lampe's document to him along with a closing letter. Forbes did, however, maintain a copy of the document Lampe had brought into his office.

Less than a month later, on April 1st, Lampe returned with a purported original instrument, similar to that first shown him except that it had a few additions which would take it out of the category of a contract and attempt to place it in the category of a will and asked Forbes to represent him. Forbes asked Lampe where he had secured the instrument which was so obviously different and Lampe told he had discovered that the first document he had brought in had been a prior contract and that this contract was the final contract they had negotiated with Koellen. Lampe wanted to hire him to present the last document in the Koellen probate action.

1. If you were Forbes, what would your ethical options be at this point regarding this representation?

To analyze this question properly, the student would need to recognize that the attorney had no duty, other than that due a potential client under Rule 1.18, because the prior representation had ended and the attorney had not yet agreed to the current representation. Thus the student should recognize that the primary issue at this point would be whether accepting the representation would place the attorney in the position of assisting a client in a fraud. The question asks for ethical options, so at a minimum, the student should analyze the two major options: decline the representation, or agree to the representation. The student should explain and apply the ethical and legal standards that would require the attorney to conduct additional investigation before presenting the will for probate (Rule 11 of the rules of civil procedure; and the following rules of professional conduct: Rule 1.2 (assisting client in fraud); Rule 3.1 (frivolous claims); Rule 3.3 (candor to the tribunal)). An especially strong answer would provide detailed advice regarding investigation and interviewing approaches that would reduce the attorney's risks, demonstrating the student's consideration of the materials in the text on pages 280-84.

2. Without drawing any inferences from the following facts about the correctness of your answer to the first question, assume that Forbes declined Lampe's employment and that Lampe left. Nearly a near passed, and Forbes read the advance sheets of the court of appeals opinions. From these, Forbes learned that Lampe had indeed presented the document in probate and that the trial court's decision holding the document invalid as a testamentary disposition was reversed by the court of appeals.

Knowing what Forbes knows at this point, does Forbes have the obligation or discretion to disclose his conversation about the document with Lampe.

The only obligation here is the confidentiality obligation of Rule 1.18 and Rule 1.6. Obligation to disclose should be analyzed under Rule 3.3 and the student should recognize that, so long as the attorney did not assist the client in presenting false evidence or testimony, he would have no duty to disclose the conversation.

Discretion would be analyzed under Rule 1.6(b) and the student would recognize, again, that the attorney's assistance would the key to the attorney having the discretion to disclose.

3. Without drawing any inferences from the following facts about the correctness of your answer to the prior questions, assume that Forbes did not disclose his knowledge regarding the document Lampe had submitted to probate. Nearly two months later, Forbes read in the local paper that the executor of Koellen's will (John Wille) had filed an action in the probate court to vacate the original judgment and also as a petition for a new trial on the ground of newly discovered evidence. Wille argued that the Lampe document was not fraudulent - neither executed or attested by subscribing witnesses as required by law and was never entitled to be admitted to record and to probate.

Curious to learn more, Forbes went to the local courthouse and read through the petition and attached affidavits. The petition included a copy of the same document that Lampe had brought into Forbes on April 1st and which Forbes had declined to present to the court. Included with the petition were affidavits by both the witnesses that they had witnessed only one document and that its terms were not those of the submitted document. An affidavit from a handwriting expert testified that he had examined the signatures of Guatney and Beatty; that the signatures of Guatney and Beatty on the will were traced forgeries.

Does Forbes have the discretion or obligation to contact the attorney for Koellen's estate to tell him about his experience with Lampe and this document?

The students would analyze this question under Rule 1.18 and Rule 1.6(b). Students might be inclined to read Rule 3.3 too broadly here to imply an obligation under that standard to disclose, but the prior analysis would still apply. Some students might recall the attorney in Riehlmann that was aware of fraudulent proceedings; however, the duty to disclose in those circumstances was because the attorney knew of a fellow attorney's violation of the rules that raised a substantial question as to that attorney's honesty and the attorney's knowledge of that violation was not gained in the course of a representation and so was not confidential.

4. Without drawing any inferences from the following facts about the correctness of your answer to the prior questions, assume that Forbes does not tell anyone about his conversation with Lampe. Assume further that the attorney for Koellen's estate nonetheless discovers that Lampe had consulted with Forbes, though he is unaware regarding what matter. The attorney issues a subpoena duces tecum directing Forbes to appear for a deposition and bring with him any documents provided to him by Lampe regarding the probate matter.

Is Forbes required to resist the subpoena and object to the deposition questions on the basis of attorney-client privilege? If he does raise the privilege, what will be the arguments the attorney for Koellen's estate will raise to overcome that objection?

The student should first recognize the attorney's ethical duty under Rule 1.6 to raise the objection if there is a good faith basis for doing so. Here, since the crime-fraud exception to privilege is not an element of the objection, the attorney would have such a good faith basis since there was a conversation between privileged persons for the purposes of seeking legal advice. The attorney would not be required to anticipate the application of the crime/fraud exception.

The document that attorney has a copy of would be a different matter, of course, because it was not a communication. Thus, the attorney may be required to turn over the document copy if asked, though the fact that he could assert privilege against any questions regarding the document (how he got it, from whom it came, etc.) would make it worthless as evidence.

The argument attorneys for the estate would raise would be the crime/fraud exception. Students should identify this as the argument, explain that the relevant standard is not whether the attorney assisted the client (as under Rule 1.6(b)) but rather, if the client sought the attorney's assistance to further a fraud, which the client later carried out, and apply that standard to the facts given. Outstanding answers would not only address the substantive standards but the procedural steps the estate attorney would be required to follow in order to successfully assert the exception.

This part of the questions is based on a Kansas case: In re ***Koellen's Estate****, 167 Kan. 676, 208 P.2d 595 (1949), but of course, a case that old is of limited value in analyzing how a court would address these issues today. I am grateful to my colleague Dan Weddle for bringing the case to my attention as a great story.*

Chapter Thirteen: Confidentiality and Misrepresentations in Negotiations

Outcomes, Assessments, and Assignments

Outcome 13-a: Reading and Analyzing Lawyer Regulation 

Students should be able to:

- Define fraud and misrepresentation.
- Recognize the duty to be truthful in negotiations and be able to identify the limited circumstances in which affirmative misstatements are permitted.
- Identify the circumstances in which an attorney has a duty to disclose confidential client information in order to comply with the duty of candor in negotiations.

Reading Assignment:

Sections 13.1 and 13.2 provide the basic doctrinal content of the chapter.

Assessment:

I find a simple "fill in the blanks" exercise using the chart on page 298 to be an effective assessment of student mastery of the basic rule.

Outcome 13-b: Communication Skills 

Students should be able to demonstrate the ways in which attorneys may persuade their clients to be truthful in negotiations, counsel a client regarding the consequences of misrepresentations in negotiations, and protect a client from misrepresentations.

Assignment:

Role playing client counseling can be conducted using the preliminary problem, in which students try to talk their client into disclosing the overpayment; the simulation problem below, in which students talk with the client about how to address a mistake by the opponent in an offer; or the "test your understanding problem" on page 313, in which students can role play the counseling session with the clients about how to handle the negative environmental report.

Assessment:

Criteria for assessing the students' skills in counseling the client include general client counseling criteria (see sample rubric in simulation problem below) as well as general preparation and understanding of the rules.

Outcome 13-c: Formation of Professional Identity

Students should be able to describe the ethical dilemmas caused by the opportunity to capitalize on an opponent's error, identify steps they can take to avoid this dilemma, and clarify their own personal ethical perspectives on this issue

Assignment:

Simulation exercise described below and/or reflective practice problem pages 312-13.

Assessment:

A rubric is provided for the simulation exercise below, which provides an assessment of substantive knowledge, skills, and perspectives on the role of lawyer.

Suggested Classroom Learning Activities

1. Set Up: Why not a rule that simply prohibits lying?
(Section 13-1, Pages 295-300; Outcome 13-a)

A good icebreaker question or question to use in an online discussion list is that raised in the notes following Rule 4.1on page 298—why not simply prohibit lies in negotiations?

2. Reading the Rules: Charting Rule 4.1
(Section 13-1, Pages 295-300; Outcome 13-a)

Students should be able to complete the chart on page 298 without reference to their text or notes.

You MUST Disclose	A Material Fact	
IF		You Know
	AND	The Client is or will be committing a Criminal or Fraudulent Act
	AND	Your silence will assist that crime or fraud
AND	You reasonably believe it is necessary to reveal	
BECAUSE	OR	It's reasonably certain that someone will die or be hurt badly if you don't reveal
	OR	It's reasonably certain the client's crime or fraud

		will result in substantial financial injury
	OR	You need to defend yourself or establish a claim based on the client's behavior
	OR	The court or another law requires you to reveal
	OR	Client gives informed consent

Questions for additional assessment of student understanding of the rule

Q. Using the examples from Professor Riely's article, listed on pages 298-99, imagine a range of situations in which the client is not being entirely truthful. Provide examples of:

- A situation in which your only duty would be to counsel the client about the misrepresentation.
- A situation in which withdrawal would be required in order to avoid ethical violations.
- A situation in which disclosure would be required in order to avoid ethical violations.

Q. Comment 2 to Rule 4.1 indicates that certain statements are not ordinarily considered statements of fact. These include opinions, intentions, and estimations. What do all these "non-facts" have in common?

Finding the Line

Using the Multiple Choice review question #5 on page 342 (in the Unit Review) can help students to find the lines in this rule. The client's statements in the question are not over the line because there are not "false statements of material fact" (rule 4.1). Either they are not fact statements at all ("Wouldn't you like to be…?") or are so general as to be reasonably interpreted as "puffery" (Beautiful forest are "hard to find"). In most states, a seller must disclose only material latent defects that are not discoverable through a reasonable investigation. *See, e.g., Shaw v. Robertson,* 705 S.E.2d 210 (Ga. App.2010)(no duty to disclose previous flooding of property because review of "reasonably accessible public documents" would have revealed property was in a flood zone). The threat of Ash borers is not a "latent defect" and is discoverable by anyone reading the news. If seller had been a broker, there might be a higher duty to inspect and disclose (in some jurisdictions), but simply as a seller there is still a doctrine of *caveat emptor* that applies.

You can take this problem one step further by asking the students to suppose that the trees were already infected with Ash Borer. Suppose further that Buyer, who was unrepresented in the negotiation, asked directly whether there were any problems with the health of the forest, and Barbara said, "This is a lot of forest for the money. I bet this forest will be here for your grandchildren!" Buyer purchased the property with the disastrous results previously described.

Here again, problems applying Rule 4.1 are tricky if you are asked where exactly one has crossed the line. Here, the fact that the buyer is unrepresented, that the attorney was speaking, and that the representation implied a future-looking quality of the land are enough to create reasonable reliance. For example, in *Jeska v. Mulhall*, 693 P.2d 1335, 1337 (Or. Ct. App. 1985), the attorney's statement that the parcel as "a lot of property for the money" was held to have crossed the line beyond "puffery" in similar circumstances. It is true that giving mere opinions, phrased as such, rather than factual assertions may reduce the risk of liability. It does seem picky that just adding "In my opinion" or "I think" could reduce risk. However, knowing the forest would not be there in two years and then saying "I bet" that it will is not merely opinion. It's deliberately intended to deceive the buyer about the future health of the forest and induce the buyer to close the deal, knowing that there is a threat to its existence. That's what takes it over the line.

3. Case Discussion: Roth v. La Society Anonyme Turbomeca France

(Section 13.2, pages 300-06; Outcome 13-a)

I use this case primarily because disclosure of insurance is one of the "negotiating facts" about which attorneys often disagree regarding their duties of candor.

The case reviews the bases for attorney liability for a client's misrepresentation in litigation and can be used as a launching pad for a much broader examination of the attorney's duty to opponents in litigation. If you do not intend to cover Chapter 21, this is a good case to call attention to the rest of the Rule 4 duties and review the rules of civil procedure briefly.

Here are some questions for students to consider and some notes on answers you might expect:

Q. Why didn't the plaintiffs include the attorneys on Count I?

A. It seems very likely that the attorneys in this case did not know about the additional insurance but were in fact following their client's lead. Thus the plaintiffs limit their claims against the attorneys to negligence and conspiracy, neither of which work.

Q. If the attorneys had known about the insurance and had advised the clients not to disclose it, would the plaintiffs have been able to include the attorneys in Count I?

A. Perhaps. The court notes that in exceptional cases of intentional tortuous acts by attorney,

an attorney may be liable to a third party, such as in cases involving fraud, collusion, or malicious or tortious acts by the attorney.

Q. What about the conspiracy claim. The court finds that, because an attorney is an *alter ego* of his or her client, a conspiracy between the attorney and client usually is not possible. Can you imagine facts under which an attorneys in this case could have been liable for conspiring with a client to commit fraud?

A. Perhaps if the attorney had been the one who thought up the idea of concealing the insurance, had been the one who misrepresented the insurance, and had talked the client into going along with the story. In other words, it's hard to imagine.

Q. The court notes that Rule 4.1 does not require disclosing facts to an opponent or even correcting a client's misrepresentation if the disclosure would violate Rule 1.6. It also goes on to emphasize that the Rules of Professional Conduct do not form the basis for a civil cause of action, making the analysis of the rules *dicta*. What do you think would be the analysis if the current version of the Model Rules applied?

A. Most states that have adopted the Model Rules departed from the ABA's Model Rule 1.6 and liberalized the categories of information that may or must be revealed, so that lawyers' disclosure obligations in those jurisdictions will likely be greater under Rule 4.1. Two exceptions to Rule 1.6 exist that could provide a basis for an exception today. First, Rule 1.6(b)(3) might apply. The key questions would be:

- Would failing to disclose the insurance "cause substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted"? (That's the basis of the claim here of course; though students should appreciate the difficulty of proving that the settlement was unrealistically low).
- Was the client's failure to disclose the insurance the "commission of a crime or fraud"? (This is where the broad definition of "fraud" that the courts sometimes use comes into play. The court on page 302 held that the Roths had stated a claim for fraud against Turbomeca. Call the elements of fraud as stated in the opinion to the attention of students.
- The question is whether being able to state a claim for fraud is sufficient for an attorney to "reasonably believe" there was fraud. Since pleading rules permit pleading facts without evidence (so long as the absence is flagged) one might argue that the threshold for disclosure under Rule 4.1/1.6(b)(3) is higher than the threshold for being able to state a claim. Again, without having more facts about what the attorneys and clients actually knew and intended regarding the answers about insurance, this is difficult to answer with any certainty.
- Did the client use the lawyer's services to commit the fraud? While the court didn't discuss this at all, ordinarily an attorney would help a client prepare answers to interrogatories and would be negligent if he or she did not do so unless the client had agreed to a more limited scope representation.

Rule 1.6(b)(6) also permits disclosure to comply with other law or a court order. Likewise, Rules 3.4(c) & (d) require compliance with discovery rules and "reasonably diligent effort to comply with a legally proper discovery request."

Q. So if the attorneys had known about the additional insurance and had failed to disclose this to the other side, would they be subject to discipline under today's version of the Rules?

A. Maybe so. First, it is important that students realize that the prohibitions in the rules may be broader than corresponding rules of civil liability or criminal law in at least the following respects:

- dishonesty (under Rule 8.4) broadly denotes a lack of trustworthiness and integrity; and
- the misrepresentation (under Rule 4.1) does not require an intent to deceive or to commit a fraud.

However courts have held that, for purposes of discipline, a misrepresentation must incorporate the tort elements of falsity, scienter (knowledge), and materiality. However, for disciplinary purposes, reliance by and injury to another person is often not required. *Florida Bar v. Johnson,* 648 So.2d 680 (Fla. 1994); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 157 (2000).

Q. The court says that the attorney was not responsible because the party, not the attorney, signed the interrogatory. What do the current rules of Civil Procedure require regarding discovery answers that would change that analysis?

A. Rule 26(a)(1)(A)(iv) provides that parties must make insurance policies available even in the absence of requests from the other party. Moreover, the rules of discovery in most states and under the federal rules of civil procedure require that a party correct, amend, or supplement untrue or incomplete discovery answers. Rule 26(e). Finally, in a parallel rule to Rule 11, Rule 26(g) requires that every "discovery request, response, or objection must be signed by at least one attorney of record" certifying that the disclosure is "complete and correct as of the time it is made." Finally, Rule 26(g)(3) provides that "If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both." (See chart on page 286).

Q. Assume that you were the attorney representing Turbomeca and that it had two separate insurance policies, with limits of $50 million and $950,000 respectively. Assume that the client has authorized settlement for any amount within the total insurance limits and that the plaintiff's attorney offers to settle the action for $500 million. At which point do the following statements cross the threshold of Rule 4.1?

a) "That's absolutely unreasonable!"
b) "I doubt I can talk my client into that."
c) "We're ready to go to trial on this and I'm confident you can't get half that from a jury."
d) "My client isn't going to settle for more than $50 million.

e) "My client's insurance policy limit is $50 million.
f) "My client has directed me to reject any settlement more than $50 million.
g) "My client will file for bankruptcy if you go to trial on this and then you will get nothing."

A. I would draw the line for discipline purposes somewhere around statement (d) but of course the entire point of the comment to Rule 4.1 is that this is a context-dependent situation. Factors?

- circumstances in which the statement is made,
- the past relationship of the negotiating persons,
- their apparent sophistication,
- the plausibility of the statement on its face,
- the phrasing of the statement,
- related communication between the persons involved,
- known negotiating practices of the community in which both are negotiating,

Q. What if the client defended against the misrepresentation claim by saying that the attorneys had advised them to answer in the way that they did. Could the attorneys reveal their communications with the clients in order to defend against this accusation? Would it matter if the attorneys had actually been sued? Subpoenaed to testify?

A. This simply permits students to recall their knowledge of the self-defense exceptions under Rule 1.6.

4. Problem Discussion

(Insurance Overpayment Problem, page 294; Outcomes 13-a and 13-c)

The insurance overpayment problem is a good one for exploring the attorney's duty of candor outside of court. Students often find this problem sufficiently difficult that it can take most of the class to discuss, especially if you weave in some of the other material from the chapter. Here are some questions you might ask and answers you might expect:

Q. Is attorney liable to client for the overpayment situation?

A. Might be. He should have had a decent accountant checking these matters all along. Rule 5.3. Failing to do so may be a violation of Rule 1.1. Even if not, that doesn't mean client won't look to attorney as source to solve the problem.

Q. In reconciling the attorney's obligation to inform the insurance company v. confidentiality obligation to the client, the applicable rules include: 1.2, 1.4, 1.6, and 4.1. If we begin with the disclosure obligation (if any) under Rule 4.1, the first key question is, "Is this a crime or fraud?"

A. Emphasize to the students that the attorney must understand their client's legal obligations and that will require research. Here, for example, Client can't keep receiving the

payments as is. At a minimum, even the payment is ahead of schedule, this would support a cause of action for restitution for the excess interest; At worst, once the payments exceed the amount actually due, the insurance company would have a cause of action for conversion and, depending on how one reads the facts and law, even a criminal prosecution theft. In some instances it is easier to prosecute retention of overpayments than in others. For example, under 42 U.S.C. 1320a-7b(b)(3), it is a crime to conceal the fact that one may have received federal health care funds erroneously.

Q. Are the lawyer's services being used?
A. Here would be the strongest argument against disclosure. Since the error is the insurance company's and not the attorney's, as he has not billed the insurance company, in what way are his services being used to further the crime or fraud? Well he's cashing the checks and that's probably enough once he becomes aware of the overpayment.

Q. What is your first obligation before you consider disclosure?
A Communicate to the client and try to persuade him to do the right thing. "Shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Rule 1.4. This would mean playing out first the scenario of nondisclosure to its logical conclusion, including your own withdrawal and the possibility that you could be called to testify in an action against the client and, because of the crime/fraud exception to privilege, would be required to testify as to the conversation. Equally important it would mean working with the client to develop a plan to rectify the problem, including likely some forfeiture of your own fee to the client (not required of course, but a likely persuasive tool). Additionally, insure that you are handling the money properly under Rule 1.15.

Q. If persuasion wouldn't work, would you have to withdraw?
A. Yes. This would be required withdrawal under Rule 1.16(a) because you would be assisting a client in fraud, which violates rule 1.2(d).

Q. Would withdrawal be sufficient?
A. The question is whether your withdrawal would be sufficient to "prevent assisting." You might very well conclude that, upon withdrawal, your assistance (cashing the checks) would end and you would no longer have an obligation to disclose. There is a strong argument for this position—certainly strong enough to raise as a defense if your complicity were later alleged, however the affirmative disclosure obligation of Rule 4.1 argues against this interpretation.

Q. Must you disclose? Since 4.1 does not permit disclosure if prohibited by Rule 1.6, this is the next rule to which we must turn: Under Model Rule 1.6, all disclosure is discretionary. However, Rule 4.1 turns the discretionary disclosures allowed by 1.6 into a mandatory disclosure. The analysis would fall under Rule 1.6(b)(2)&(3)—the financial fraud exceptions. The question then becomes: Is this substantial injury to financial interests?

A. Probably so. Substantial likely means "more than de minimus" and this is certainly a significant sum in absolute, if not relative terms.

Q. Would disclosure "prevent, mitigate or rectify" the fraud?
A. Probably yes.

Q How much disclosure would be "necessary"?
A. Probably a "check your figures" would do the job. You certainly don't have to calculate the overpayment for the insurance company. The attorney has a good deal of discretion here.

Q. What would happen in states that do not recognize the fraud exception to 1.6?
A. You would have to withdraw quietly and stay quiet.

Q. How do you feel about that?

5. Simulation Exercise: Capitalizing on Errors
(Section 13.3, pages 307-15; Outcomes 13-a and 13-c)

This section presents two difficult questions for students to consider:

- May an attorney accept a settlement when he or she believes the other side has made an error in the settlement offer?
- Must an attorney obtain a client's permission to disclose what the attorney believes to be the other side's error in an offer of settlement?

The latter question is particularly useful in framing for students the differences between client-centered and directive models of the attorney-client relationship.

An effective way to emphasize the choices to be made in this situation is to engage students in a simulation in which they must ascertain that an error has been made and then determine what to do about the error. The most important part of the simulation is the discussion with the client. This discussion can demonstrate the student's understanding of the consequences of misrepresentations or overreaching, both the legal consequences (as in the *Turbomeca* case) and the professional consequences (reputation and effectiveness).

The following are some materials to use in building such a simulation. The students can be assigned to write a 2-3 page letter to the client or to record an oral client counseling session as a product of the simulations. This could be completed in a short a time as one afternoon if assigned as a closed problem with no additional research required.

Story timeline:

- 36 months Client enters into ten-year lease to operate a restaurant in a small strip shopping center.

- 34 months	Client opens restaurant.
-24 months	Client ends first year with restaurant operating at a nice profit
-12 months	Client's spouse leaves and files for divorce.
- 6 months	Client's divorce is finalized. Client is allocated entire property interest in the restaurant businesses, but must pay substantial cash settlement.
-4 months	Client is in a car accident and is in hospital for a week and off work for six weeks.
- 3 months	Client misses first rent payment of $15,500
- 2 months	Client misses second rent payment $15,500.
- 7 weeks	Landlord's attorney contacts Client; Client comes to see attorney
- 6 weeks	Negotiations to settle back rent issue begin. Initial offer of $31,000 plus interest ($34,000) plus attorneys fees of $600.
- 4 weeks	Client makes next rent payment, but is still behind $31,000 rent.
- 1 weeks	Landlord's attorney offers to settle for $31,000 plus attorneys fees of $1800 and waive back interest if paid in full by next rental date
- 1 day	Landlord's attorney sends proposed settlement agreement indicating that, if client sends current rent due plus $13,000 plus $2000 attorneys fees within 24 hours, landlord will waive any other amounts due. No reason is given for the substantial difference in amount from the past offer.
- 4 hours	Client has called for appointment to discuss how much to pay in this month's rent and the current status of settlement negotiations.

Cast of Characters:

You could assign the following roles to students or save some of these roles for others or yourself.

Name	Job Function	Any characteristics
Lee Lessee	Client, lessee	Good business person who's had a run of hard luck. Will rely heavily on

		attorney's advice, but isn't a pushover.
Pay-em Leasing	Lessor/ opposing client	Not a nice company; Huge absentee landowner.
Manny Manager	Manager of the properties at 59th Street.	Rather clueless employee of Pay-em.
Neu Attorney	Opposing Counsel, represents Pay-em	Incompetent, overburdened, and ethically clueless
Lawyer	Represents Lee	Students can choose to play this as they see fit or you can provide a standpoint for them to proceed from (client centered/instrumental, collaborative, directive)

Sequence of Simulation

Students are assigned problem by voicemail from senior partner. They are told that a paralegal will send a follow-up memo and that attorneys should talk to the paralegal if they need anything further.

Paralegal will provide background memo and letter from opposing counsel offering settlement.

Students may contact Neu during the simulation—if they do, Neu should be extremely gracious and offer to settle for the back rent only and waive his attorney's fees.

Students should prepare to explain to client what they have done (if they have contacted other attorney without permission) or want to do (if they have not and want to do so) regarding the settlement offer. Client should be upset at any action without his or her authorization, but willing to compromise and work with the other side if attorney presents sufficient reasons to do so.

First Memo to File:

Our client Lee Lessee is the owner of a number of commercial properties in the 600 block of 59th Street in Kansas City, Missouri. Lee runs a restaurant out of the property. The neighboring co-tenants operate a bookstore and a yoga shop. Lee is in the third year of a ten-year lease of the property from Pay-em Properties, Inc. The rent is

calculated based on a base rent plus a percentage of the profits calculated from the average of the prior six-month period. Lee's restaurant has become quite successful.

However, this past year Lee has had some bad luck. Lee's got divorced and then suffered some injuries in a car accident from which it took two months to recuperate. As a consequence, Lee has fallen behind on the restaurant rent payments to the tune of $31,900 (two payments).

Pay-em Properties, which has been eyeing this property for other uses, has threatened to sue to recover the past-due rent and to terminate the lease.

Lee's business is doing well enough that Lee certainly does not want the lease terminated. I have been negotiating with Pay-em's attorney, who has been taking a pretty hard line on settlement. Their initial offer was for $31,000 plus interest ($34,000) plus attorney's fees of $600, with no indications that they would move much from this position. At our last meeting, Landlord's adjusted the offer some to waive the interest after I presented the legal difficulties in recovering interest; however the amount of his attorney's fees has increased substantially to $1800. (I can't imagine why Pay-em is putting up with his attorney's churning this case so, and think I can probably reduce that amount some). This offer is open until next rental due date.

Second Memo to File:

Met with client Lee Lessee today. Lee was unwilling to accept the Landlord's offer but is ready to make the next rent payment due tomorrow, but is still behind $31,000 rent. By fax, I received from Landlord's attorney a proposed settlement agreement indicating that, if client sends current rent due plus $13,000 plus $2000 attorneys' fees within 24 hours, landlord will waive any other amounts due. No reason is given for the substantial difference in amount from the past offer. I believe that the offer is too generous to be anything other than a transposition mistake.

I haven't yet mentioned this to Lee, but I'm pretty confident we'll get an initial reaction to "be grateful for their stupidity and get the case settled."

I really don't much like Pay-em—I've represented one too many people they've tried to take advantage of. But opposing counsel is a brand new attorney who has taken on way too big a caseload and is having a real hard time juggling. That's another reason why I'm pretty sure this is a mistake—but why I'm also pretty sure that if Lee simply signs and pays up, that will be the end of it. But I could be wrong.

I've done some research on the law of mistake and reformation and I'm pretty sure that if indeed this is a mistake, opposing counsel could come back and get the settlement

rescinded or reformed on the basis of mistake or even misrepresentation. Here is some of the authority I've read on the substantive law question:

Stare v. Tate, 98 Cal. Rptr. 264, 266-69 (Cal. Ct. App. 1971) (allowing reformation of property settlement agreement where wife's lawyer made obvious calculation error that husband's lawyer was alerted to by accountant and took advantage of in negotiations). But see, *Brown v. County of Genesee*, 872 F.2d 169, 173-75 (6th Cir. 1989) (refusing to vacate settlement based on mutual mistake where defendant's lawyer suspected—indeed, believed it probable—that plaintiff's counsel was basing settlement on misunderstanding of important information).

The Restatement (Second) of Contracts, Section 61 provides that:

> A person's non-disclosure of a fact known to him is equivalent to an assertion that the fact does not exist in the following cases only:
> (a) where he knows that disclosure of the fact is necessary to prevent some previous assertion from being a misrepresentation or from being fraudulent or material.
> (b) where he knows that disclosure of the fact would correct a mistake of the other party as to a basic assumption on which that party is making the contract and if non-disclosure of the fact amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing.
> (c) where he knows that disclosure of the fact would correct a mistake of the other party as to the contents or effect of a writing, evidencing or embodying an agreement in whole or in part.
> (d) where the other person is entitled to know the fact because of a relation of trust and confidence between them.

Voicemail from Client to Senior Partner:

Barbara—your secretary set me up with a phone appointment for this afternoon at 4:00. I need to know what you think I ought to do about the rent payment I have to make by 5:00 today. If you think we can get any more progress on settlement, I need to know; otherwise, I guess I'd better just pay up the whole amount. I'd sure like to avoid paying that stupid interest and those inflated attorney's fees. I need your advice. Talk to you at 4:00.

Voicemail from Senior Partner to Student Attorney:

Hey, your secretary tells me you're in a meeting. Listen, as soon as you get this message, I need you to get on the Lessee case and handle it for me. I have to be out of

town this afternoon and Lee is calling at 4:00 for some counseling. I trust you to handle the matter in whatever way you believe appropriate. My paralegal will give you the memos to the file on this—ask if you need any additional information.

Listen, here's the deal—I'd be inclined to contact opposing counsel and confirm the accuracy of the offer before you meet with Lee, but I'm not sure you can do that ethically and I'm sure Lee would go through the roof if he found out we did this. So you'll need to decide how you want to counsel Lee on this. Decide whether we can simply counsel Lee to agree to the settlement, without any investigation or discussions with opposing counsel to determine whether the offer is in error. Whatever you do, try to keep this client happy without crossing any lines that will get us in trouble. In particular, don't think we can just drop the client—this is too important a client and, at this point, our withdrawal won't stop the deal from getting closed on these tenuous terms.

Good luck.

CLIENT COUNSELING EVALUATION

Criteria	Insufficient	Acceptable	Exceptional
Responsiveness	The attorney is unresponsive to one or more of the client's questions.	The attorney answers questions but answers are unclear, incomplete or inaccurate.	The attorney answers each client's question clearly and directly where possible and indicates steps that will be taken to answer any questions left open.
Consideration of Alternatives	The attorney does not communicate whether alternative courses of action are available.	Reasonable alternative courses of action are presented, but the attorney does not suggest advantages and disadvantages of each.	Reasonable alternative courses of action are presented, with clear indications as to which would be preferable and why.
Legal	The attorney makes inaccurate	All references to legal standards are	All helpful and critical legal

Considerations	statements of legal standards or fails to address key legal standards.	clear, consistent and complete and explained in accessible terms to client.	standards are described clearly and in plain language.
Practical Considerations	The attorney provides no analysis of the practical aspects of the resolution suggested.	The attorney provides some discussion of the practical efficiency and effectiveness of the alternative resolutions or their economic, reputational, relational, emotional or moral impact on the client	The attorney explains why the proposed resolution is practically workable, efficient, and effective in resolving the issue or practical challenges to this result. The attorney includes analysis of non-legal factors in assessing the proposed resolution (such as the economic, reputational, relational, emotional or moral impact on the attorneys and the parties)
Client Considerations	The attorney does not solicit or address the client's goals and values.	The attorney solicits the client's goals and values but does not address them in counseling a resolution.	The attorney solicits and addresses the client's goals and values and the role those play in driving the resolution of the matter.
Active Listening	The attorney listens poorly, ignoring emotions, and failing to obtain critical client information.	The attorney listens passively but effectively obtains client information.	The attorney listens actively and confirms the client's information and emotions.

Ethical Judgment	The attorney's approach to the situation results in an unethical, illegal, or impractical outcome and/or employs unprincipled reasoning.	The attorney's approach to the situation represents an acceptable exercise of ethical judgment but lacks confidence or overlooks some nuances of decision	The attorney's approach to the situation represents an appropriate and complete exercise of ethical judgment

6. Closure: Problem Discussion

(Test your Understanding Problem, page 313)

The "Backbreak Acres" problem provides basic analysis of the rules, but this would also make an effective problem for the students to role play discussing the audit with the opposing attorney. I like to ask some students to demonstrate each of the tactics described by Professor Reilly in his article cited on pages 306-07 and then have the class name the tactic. ("Ignoring the question, offering to return to the question later; answering only part of the question; answering a related but less intrusive, specific or direct question; or calling the question unfair or inappropriate and therefore not entitled to a response.") I then ask for suggestions on how to respond. This is one of the many places I cite one of Glesner's Rules of Professional Wisdom: "Never wrestle with pigs." (See page 495 of text).

7. Closure: Summarizing Categories of Disclosure Requirements in Negotiations

I recommend Professor Nathan Crystal's categories of attorney disclosure requirements in negotiation as one way to draw together the materials in this chapter:

1. corrective disclosure;

2. disclosure of known mistakes in a writing;

3. fiduciary disclosure; and

4. disclosure of mistakes about basic facts when required by good faith.

Nathan M. Crystal, *The Lawyer's Duty to Disclose Material Facts in Contract or Settlement Negotiations*, 87 KY. L.J. 1055, 1077 (1999)

Chapter Fourteen: Confidentiality and Counseling Compliance

Outcomes, Assessments, and Assignments

Outcome 14-a: Reading and Analyzing Lawyer Regulation

Students should be able to distinguish between informing a client of the law and assisting a client in evading or breaking law; recognize that regulations other than rules of professional conduct may control the attorney's relationship with a client, especially in practice before federal agencies; and analyze the attorney's duty to counsel the client to comply with the law, whether an individual or an entity.

Assignment:

Chapter 14.

The preliminary problem can be the best vehicle for reviewing the materials in this chapter.

Assessment:

Test your understanding True-False questions at the end of the chapter cover most of the basics.

Outcome 14-b: Formation of Professional Identity

Students should be able to assess their own comfort with the attorney's role as a counselor and gatekeeper.

Reflection Assignment:

Reflective Practice: Thinking about the Attorney's Public Role, pages 332 and 335.

Assessment:

This is a little different approach to reflection than other reflective learning exercises in the book, in that the students are asked to reflect on a particular reading. This can often cause students to retreat to "law student analysis" mode rather than truly reflect on their own personal views and compare and contrast those with Professor Gordon. If you assign this exercise, remind students that they should be working toward greater self-understanding in reflecting on the article.

Outcome 14-c: Researching Issues in Professional Responsibility ⓘ

Students should be able to be able to locate and analyze regulations governing attorney practice before agencies.

Research Assignment:

Researching Professional Responsibility 14-A: Finding Federal Regulations (page 329).

Assessment:

Some students will simply know the answer to the problem presented, through a prior career as a tax accountant or through their tax classes. However, challenge all the students to demonstrate a research process that would begin without knowing the source. Students should be able to identify how and where they were able to locate 31 CFR Subtitle A, Part 10—Practice Before the Internal Revenue Service.

Suggested Classroom Learning Activities

1. Set Up: The Special Role of In-House Counsel

(Chapter 14, Outcomes 14-b)

I always begin by asking students to imagine a client who is planning a foolish and possibly unlawful activity that will harm others and that, if discovered, will significantly harm the client. I then ask them to think about how counseling that client to comply with the law might be more difficult if the client is an entity and the attorney is the in-house counsel. Some concepts they should be able to address include:

1. The amorphous nature of the client. The client is the entity, but the "entity" is a fiction. The persons who are ultimately responsible for making decisions on behalf of the entity are the members of the board, but the board doesn't provide the day-to-day management of the company. That management is made up of individuals with whom in-house counsel works every day and who often think of the in house counsel as their lawyer, as might the employees with whom in house counsel works regularly.

2. The amorphous nature of the duty. It is sometimes difficult to determine what a natural person who is your client wants from your representation or the scope of the representation, but you can usually clarify this with some discussion. With an entity, the in-house counsel's duty is not as easily clarified, given the multiple voices that might be speaking on behalf of the entity and the often expansive authority of in-house counsel. Limiting the scope of representation can be much more difficult for in-house counsel, given their day-to-day

interaction with the client. Moreover, in heavily regulated industries and public companies, the voices of regulators and shareholders compete for attention in determining duty.

3. The judgment calls required to fulfill the duty. When representing an entity, the ultimate decision regarding how much counseling is required depends on a determination of the best interests of the entity. However, in-house counsel might have a very different opinion about the entity's interest that does any other entity person who might be speaking on behalf of the entity. In house counsel may not only see risks differently but may also have a different risk tolerance. The line between a business decision and a legal decision is often fuzzy.

4. The dependency on the client. Withdrawal is sometimes the best choice when faced with a difficult client with whom you have fundamental disagreements. But for in-house counsel, withdrawing from a representation means losing their only client. An attorney can generally withdraw from a representation quietly without anyone outside the representation ever knowing. An in-house counsel's decision to resign from a company is far more "public." (In that sense, an in-house counsel's threat to withdraw might have more coercive power over the client, but only if the attorney is truly ready to quit).

5. The identity with the client. In-house counsel is more than just the attorney for the entity. They are identified with the entity far more than most attorneys are identified with their clients. Some in-house counsel may have officer or director roles in the company in addition to their role as an attorney. Though this can often raise conflicts of interest, it is not per se prohibited. When that is so, an attorney faces an even more serious ongoing tension between protecting the company of which he or she is a part from trouble and providing the required compliance counseling (and even disclosure) required by the rules and law.

This discussion can be a good point to review some of the issues raised by Professor Gordon's analysis of the corporate attorney's role as an agent of justice.

2. Class Activity: Problem Discussion

(Introductory Problem, page 317; Outcome 14-a)

This problem invites students to consider how to counsel compliance and how to respond when their compliance counseling fails. One of the most important ideas I want students to take away from this problem is the understanding that decisions regarding the attorney's duties to counsel the client or to disclose wrongdoing begin with a thorough understanding of the client's legal duties and requires careful exercises of judgment as to the scope of the attorney's representation.

The following excerpts from articles addressing similar issues may be helpful to you in guiding this discussion.

> The key role of the private bar is due to the unique characteristics of environmental law. Environmental law, with its mixture of science and policy, operates through a complex system of regulations that relies for its effectiveness on massive inputs of information and self-reporting by those regulated…. Consistent compliance by the regulated community with ongoing regulatory requirements - the most important aspect of which is full and accurate reporting - is crucial to the smooth functioning of the environmental protection system. The lawyers' duty in advising their clients on compliance and reporting is key for the system to function and to serve the public interest in both environmental protection and the rule of law.

J. William Futrell, *Environmental Ethics, Legal Ethics and Codes of Professional Responsibility,* 27 LOY. L.A.L.REV. 825, 834-839 (April 1994).

> Without some kind of risk assessment, at least a limited one, it is unclear how Anderson could disclose the release. The more serious the release, for example, highly toxic waste released in proximity to a vulnerable human population, the less detailed the study would need to be in order to satisfy the certainty standard. Before disclosing, the attorney should consider: (1) what vectors would lead people into contact with the waste; (2) the type(s) of population(s) that would likely encounter the waste; (3) the volume, toxicity, persistence, and likely synergistic interactions of the waste with other substances; (4) the circumstances under which the waste was released; (5) the date of the release; (6) the location where the waste was released; and (7) whether any other wastes were or are present at the site. These factors would allow the attorney to make a reasoned, informed decision whether to disclose."

Nicholas Targ, *Attorney Client Confidentiality in the Criminal Environmental Law Context: Blowing the Whistle on the Toxic Client*, 14 PACE ENVTL. L. REV. 227, 266 -267 (1996).

For a PowerPoint presentation using the OPM Leasing Fraud case, see Clark Cunningham's course exercise at http://www.teachinglegalethics.org/content/opm-exercise and his presentation at http://www.teachinglegalethics.org/content/opm-teaching-exercise.

3. Class Activity: Discussion of *Milavetz, Gallop & Milavetz, P.A. v. United States*
(Section pages 322-29; Outcome 14-a)

Remind students of the discussion/reading from Chapter 2 regarding the growth in federal and state legislative and executive regulation of attorneys. In this excerpt from *Milavetz*, we examine regulation of the attorney-client counseling function. As is likely obvious from the margin comments, I find the majority's opinion to be a strained interpretation of the code—the right result for the wrong reasons. That advice doesn't involve advantages, disadvantages and options is to ignore the very definition of informed consent or to presume that a client needn't

give informed consent to follow an attorney's advice, which is a very directive viewpoint of the attorney-client relationship.

Questions following the case

Q1. This question is designed to highlight the need for careful judgment and documentation of advice provided given the difficult position in which the code places attorneys.

Q2. If you wish to explore the constitutional implications of regulation of attorney speech raised by this case, I highly recommend the work by Renee Newman Knake on the subject. See, e.g., Renee Newman Knake, *Contemplating Free Speech and Congressional Efforts to Constrain Legal Advice*, 37 RUTGERS L. REC. 12 (Spring 2010).

4. Reporting on Research
(Research Problem 14-A: Finding Federal Regulations; Outcome 14-c)

Question 3 after the *Milavetz* case can provide an excellent segue into the research assignment. One variation on the assignment is to assign students to find one of the examples (you can divide the class among subject areas) cited in the article and then determine whether that regulation still provides the regulation described in the article and whether any courts have interpreted the regulation's applicability to attorney advice.

5. Charting the Rules: Counseling the Entity Client
(Section 14.2, pages 330-33; Outcome 14-a)

Ask students to break down the first sentence in Rule 1.13(b) into a series of questions or a flowchart that will determine whether any action is required.
Here is an example of such a flowchart:

<table>
<tr><td colspan="2">1. Do you REPRESENT THE ENTITY?</td></tr>
<tr><td>IF YES, then</td><td>IF NO, Rule 1.13 Does not create a compliance duty

You not only have no duty, but should not be providing legal advice to an entity that you do not represent (See Rules 4.2 & 4.3).</td></tr>
<tr><td colspan="2">2. Is there a threat of LIKELY SUBSTANTIAL INJURY?</td></tr>
<tr><td>IF YES, then</td><td>IF NO, Rule 1.13 Does not create a compliance duty</td></tr>
</table>

	Attorneys may but need not alert clients to risks of minor or remote harm (cmt. 4, Rule 1.13). They do not, however, have a duty to counsel compliance to avoid these risks.
3. Is the injury TO THE ENTITY?	
IF YES, then	**IF NO, Rule 1.13 Does not create a compliance duty** Attorneys may not assist their clients in criminal or fraudulent conduct (Rule 1.2(d)). Other duties and exceptions might apply (e.g., Rule 1.6(b), 3.3, 4.1), but Rule 1.13 does not apply (See cmt. 6 Rule 1.13).
4. Is the injury the result of ACTS, INACTION, OR PLANS of an officer, employee or other PERSON ASSOCIATED WITH THE ENTITY?	
IF YES, then	**IF NO, Rule 1.13 Does not create a compliance duty** You may have a duty under Rules 1.1 and 1.4 to counsel the entity regarding an external threat, but not under Rule 1.13 (i.e., this is not a compliance issue).
5. Is the threat in a matter that is RELATED TO THE REPRESENTATION?	
IF YES, then	**IF NO, Rule 1.13 Does not create a compliance duty** If the matter is outside the scope of your representation, you may but need not invite the client to expand the scope but may not do so unilaterally. (See cmt. 5, Rule 2.1)
6. How confident are you about the threat (i.e., do you KNOW of the act, inaction, or plan that will result in injury?)	
IF YES, then	**IF NO, Rule 1.13 Does not create a compliance duty**

	If you only guess, or suspect, you may have a duty to investigate if the matter is one for which you otherwise have a duty to provide advice or for which you represent the client. Otherwise, you ordinarily have no duty to investigate your own client. (See cmt. 5, rule 2.1)
7. Does the act, inaction, or plan VIOLATE A DUTY TO THE ENTITY or IMPUTE A LEGAL VIOLATION TO THE ENTITY?	
IF YES, then	**IF NO, Rule 1.13 Does not create a compliance duty** Only when the law is violated does the attorney's duty attach. If the actions or plans are legal, the attorney should ordinarily accept entity decisions even if the actions are imprudent or unwise. (Cmt. 3, Rule 1.13).
Attorney has the duty to proceed as is REASONABLY NECESSARY in the BEST INTERESTS OF THE ORGANIZATION. Note that comment 4 to the rule identifies a number of factors relevant to this plan: the seriousness of the conduct and consequences, the motives and responsibility of the constituent and company policies.	

6. Charting the Rules Part Two—Sarbanes Oxley & Rule 1.13
(Section 14.2, pages 334; Outcome 14-a)

The chart on page 334 should lead students to perceive the close parallelism between the federal regulation and Model Rule 1.13

Attorney who becomes aware of evidence of activity by an issuer or by any officer, director, employee, or agent of the issuer, 205.3(b)(1), that indicates a material violation of securities	Knows (1.13(b)) Officer, employee or other person associated with the entity (1.13(b))

law or breach of fiduciary duty has occurred, is ongoing, or is about to occur, 205.2(e), shall report such evidence to the issuer's chief legal officer (or the equivalent thereof) or to both the issuer's chief legal officer and its chief executive officer (or the equivalents thereof) forthwith. 205.3(b)(1)	violates a duty to the entity or a legal violation that can be imputed to the entity (1.13(b)) action, inaction, or plans (1.13(b)) proceed as is reasonably necessary,
If the lawyer reasonably believes the CLO or CEO has not made an "appropriate response" within a reasonable time, the attorney shall report shall report the evidence of a material violation to the audit committee or equivalent independent committee of the issuer's board of directors, to a qualified legal compliance committee (QLCC) or, if no committee, directly to the board. 205.3 (b)(3)	Rule does not dictate the steps as concretely, but simply says "including disclosure to the highest authority that can act on behalf of the organization" (1.13(b))
If attorney has reported to anyone other than a QLCC and still sees no appropriate response within a reasonable time, the attorney shall explain to the CLO, CEO, and directors and may disclose to the SEC. 205.3(b)(3)	May disclose if highest authority refuses to address in a "timely and appropriate manner" and lawyer reasonably believes the violation is reasonably certain to result in substantial injury, may disclose outside entity as necessary to prevent injury to the entity. (1.13(c)).
Reporting out is limited to situations in which the attorney reasonably believes this report is necessary to prevent a material violation that is likely to cause substantial injury to the financial interest or property of the issuer or investors; or to prevent perjury or otherwise defraud the SEC, or to rectify substantial financial or property injury to the issuer or investors caused by a material violation if the attorney's services	Reporting out may be permitted by 1.13(c), or 1.6(b), including 3.3 to prevent perjury or to rectify client fraud resulting in substantial financial injury using the lawyer's services

were used. 205.3(d)(2)	
An attorney who reasonably believes he was fired for reporting evidence of a material violation may notify the board of directors. 205.3(b)(10)	1.13(e) shall proceed as in reasonably necessary to inform highest authority of discharge or withdrawal.

7. Closure: Review Problem

(Test Your Understanding, page 336)

1. False. Rule 1.13 (e)—attorney has to report if fired for efforts to comply with ethical obligations.

2. False. Rule 1.6(b)(4)—yes he can.

3. False. Probably not, since the standard for obligation under 1.13 is "violation of law" (this is) that "is likely to result in substantial injury to the organization" (here attorney believes the injury is significant but not substantial). (See comment 3 to Rule 1.13) Were attorney's assessment of risk as greater than this, that is, if attorney believed the risk were substantial, then the answer would be true. See 1.13(b)

4. Same answer as above but would be true if substantial.

5. False. (Note the change in the factual assumptions in this statement). See Rule 1.13(c), which is an additional exception to 1.6. Attorney may report to the extent reasonable necessary to prevent substantial injury to the organization

6. Reasonable minds can differ on his one. That's not how I read Rule 1.13(d). If the information were about the thefts, then no—he couldn't reveal. But this is not information relating to the purpose for which he was asked to investigate and does not place him in a role akin to a defense attorney.

Unit Four Review

Practice Review: Communicating about Confidentiality

This review problem nearly always prompts lively debate among the students. Asking the students to take a side and prepare to more fully defend one or another of these positions can be an effective method for reviewing the policies of confidentiality as well as the visions of the attorney's role.

Unit Five Preview: Conflicts of Interest

The Pre-test is an effective way to help students recognize that the answers to conflict of interest questions are not intuitively obvious. Some of the statements are simply designed to unearth easily confused distinctions in the rules or emphasize the detail with which the rules regulate certain potential conflicts. Others however can be the basis for some introductory policy discussion. Students are provided the answers in the Unit Review on page 456.

If you wish to use the questions to preview some of the risk balancing discussion in Chapter 15, you can either ask students to choose one statement that they feel strongly should be true or false and then defend that choice. Statement #1 ("appearance of impropriety") is an especially good one for this exercise, because it can be used to emphasize the tensions between client choice and attorney mobility on the one hand and the image of the profession on the other. This can be an especially important discussion if you will not be discussing the importance of the image of the profession as a significant government interest in the advertising chapter. Likewise, statement #4 (positional conflicts) can be useful for exploring the concept of attorney independence.

Chapter Fifteen: Overview of Conflicts of Interest

Outcomes, Assessments, and Assignments

Outcome 15-a: Reading and Analyzing Lawyer Regulation

Students should be able to explain the basic structure of conflicts analysis.

Reading Assignment:

Chapter 15.

In particular, sections 15.2-15.3 direct the students' attention to the entire set of rules that address conflict of interest and focus in particular on Rules 1.7 and 1.10 as essential to understanding the structure of conflicts analysis.

Assessment:

Asking students how they might set up a system for identifying conflicts of interest can work very well as a basic assessment of their understanding of how conflicts analysis works.

Outcome 15-b: Reading and Analyzing Lawyer Regulation

Students should be able to recognize that conflict of interests analysis is a measurement of risks and that the disciplinary rules tolerate risks of some actual betrayals of trust and loyalty more than other betrayals.

Reading Assignment:

Section 15.1 is designed to encourage students to think about conflicts rules in terms of risk assessments.

Assessment:

Much of this insight has to be continually assessed throughout this unit, by regular discussion of problems.

Suggested Classroom Learning Activities

1. Set Up: Fill in the Blanks

(Sections 15.2, pages 351-54; Outcome 15-a)

I begin the class by emphasizing the importance of this chapter for the students' overall understanding of conflict of interests and urge them to take seriously the cautions provided at the bottom of page 352 and the common misconceptions in section 15.4. If you want to simply help students recall the language of the rule, here are some "fill in the blank" questions you could provide as starters for flash cards or a quick quiz. I provide these for students to use as a guide to making flash cards to study for the MPRE. These can also be used to uncover some of the common misconceptions.

Q Rule 1.7(a)(1) There are two types of concurrent conflicts of interest. One is if the representation of one client will be _____ _____ to another client.	**A** Directly adverse
Q Rule 1.7(a)(2) There are two types of concurrent conflicts of interest. One of these is if there is a significant risk that the representation of one or more clients will be _____ _____ by the lawyer's responsibilities to someone else or by the attorney's own personal interest	**A** Materially limited
Q Cmt. 2, Rule 1.7 explains the steps in conflicts of interest analysis. What is the first step?	**A** Clearly identify the client or clients.
Q Cmt. 3, Rule 1.7 explains that, if an attorney is not aware of a the persons and issues in a representation that cause a conflict, he may still be subject to discipline if he failed to _____.	**A** Adopt reasonable procedures to identify conflicts.
Q Cmt. 4, Rule 1.7 explains that, if a conflict arises after representation has been undertaken, the lawyer ordinarily must _____.	**A** Withdraw from representation.
Q Cmt. 5, Rule 1.7 addresses the situation in which unforeseeable developments create conflicts in the midst of a representation. Depending on the circumstances, the lawyer may be able to avoid the conflict by dropping one client. However, the lawyer must seek _____ _____ where necessary and take steps to _____ _____.	**A** Court approval/ minimize harm to the client.
Q Cmt. 6, Rule 1.7 says that, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are _____ _____.	**A** Wholly unrelated.

Q Cmt. 6, Rule 1.7 explains that, an attorney may represent two client's whose interests are only _____ adverse, without needing consent.	**A** Economically
Q Cmt. 7, Rule 1.7 If a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, is informed consent necessary?	**A** Yes
Q Under Rule 1.7(b) an attorney may represent a client even if there is a concurrent conflict if four conditions exist. One condition is consent: whose consent is necessary to waive a concurrent conflict?	**A** Each affected client.
Q Under Rule 1.7(b) an attorney may represent a client even if there is a concurrent conflict if four conditions exist. A second condition is the attorney's analysis of the degree of risk of the conflict. An attorney must _____ _____ that he can provide competent and diligent representation.	**A** Reasonably believe
Q Even if the attorney thinks it's reasonable to represent a client when a concurrent conflict exists and the client gives informed consent, an attorney may not represent one client in asserting a claim against another of the attorney's clients _____.	**A** In the same litigation or other proceeding before a tribunal
Q The four nonwaivable conflicts of 1.7(b) are an unreasonable waiver, a waiver without informed consent confirmed in writing, a suit between two clients, and _____	**A** A representation prohibited by law.
Q May an attorney ordinarily represent co-defendants in a criminal action?	**A** No. Cmt. 23, Rule 1.7

2. Charting the Rule

(Section 15.2, page 354; Outcome 15-a)

The suggested chart on page 354 is one way to check student basic understanding of the rules and to see how difficult it is to categorically predict conflicts matters without lots of facts. Ask students to imagine a situation in which they currently represent a client in a personal injury accident case in which the client was a passenger in a bus that was hit by a drunk taxi driver. The situation is one in which it appears that the taxi driver was almost certainly 100% at fault. Ask them to then consider these other potential clients and representations and determine which box each would be likely to fit into:

1. In the suit against the taxi driver, could you represent another passenger in the bus as a co-plaintiff? There is likely no conflict or risk of conflict.

2. In the suit against the taxi driver, could you represent as co-plaintiffs two other passengers in the bus who are currently involved in a lawsuit against one another in an unrelated matter (assume neither you nor your firm represents either in the other lawsuit)? Probably.

3. Could you represent the driver of the bus as a co-plaintiff against the taxi driver? Probably, but you would want to be sure that there was no possibility of a cross claim that might make the parties directly adverse.

4. Could you represent a witness to the accident in a completely unrelated suit against her employer for wrongful discharge? There is not likely to be a conflict if she's a witness for the plaintiff; but if she's a defense witness, seems like a "material limitation" risk, for which it would be impossible to get informed consent.

5. Could you sue the insurance company that insures the taxi driver in a bad faith refusal case arising out of a plane crash that has nothing to do factually with this accident. This isn't exactly a "suing your own client" situation, but it's close enough that I would find it difficult to say that a reasonable attorney could conclude that this is consentable. Rule 1.7(b)(1). If the insurance company is directing the defense of the taxi driver, the attorney might be in the position of learning information about how that company operates in deciding whether to pay claims that would be relevant in proceeding against the taxi driver. On the other hand, the insurance company is a sophisticated client so that, depending on more facts, it would not be strictly non-consentable under 1.7(b)(3).

3. Review Problems

(page 358)

1. Husband and Wife are involved in a support and custody suit involving their infant son. Husband's father is an attorney and would like to represent his son in the action. May he?

I first ask students what additional facts they would want to know. These include whether the parents have been divorced for some time and this is a modification action, or whether they are also divorcing at this time; how long they have been married; the relationship between the grandfather and the son, daughter-in-law, and grandson; the grandfather's expectations or opinions about the matter and the extent to which they are likely to interfere with his representation of his son; etc.

I then ask the students to identify the ways in which this situation might create a "material limitation" on the attorney's representation. The court in the cited case, *Kennedy v. Eldridge*, 2011 Cal. App. LEXIS 1561 (Cal.App. Dec. 13, 2011), highlighted several:

First, grandfather might have confidential information from Wife that, while she isn't a client, would be at the worst unseemly for him to use. (The court noted that one doesn't have to be a former client to present a conflict).

Second, the court found that the danger that Father would testify was great.

Third, the court was concerned that the infant son's welfare would be injured by an attorney who had a personal interest in the action (akin to having a personal interest in the subject matter of the representation).

May the grandfather's partner represent the son?

The general rule is that a conflict imputes to partners, but not if the conflict is one of a personal nature. This would appear to be such a conflict, though the partner would have to decide whether the personal interest that Grandfather has would be likely to influence his or her representation.

2. Attorney is also a medical doctor. The state's medical malpractice statute requires a doctor's affidavit that a malpractice claim is not frivolous as a condition for filing suit. May attorney provide this affidavit for his own client? Fuller v. Crabtree, 2009 Tenn. App. 137 (Tenn. App. April 16, 2009).

The case cited was one in which the attorney doctor filed the affidavit and participated in the hospital's peer review system and that affidavit was relied on in a summary judgment motion. The attorney-doctor was then added as plaintiff's attorney and a motion to disqualify followed. The trial court denied the motion and the appellate court reversed, citing Rule 3.7 and noting that the attorney had already acted as a fact and expert witness in the case and was likely to be a necessary witness going forward. The court was also concerned that the state peer review laws required confidentiality for any information the attorney-doctor had learned during his participation in that process.

3. Imogene Injured wants to hire Robert Representative to sue a company involved in producing a very dangerous product that has caused Imogene significant injuries. Robert has heard through the grapevine that the company has settled most of the previous cases on the condition that the plaintiffs agree to refrain from disclosing or authorizing the disclosure of any information relating to their suits. Robert wants to help Imogene but he also wants to be able to use the information he gains in her representation to assist other victims in their suits. He is outraged by the company's practice— believing it to be just this side of extortion. He wonders whether he could ask Imogene to agree to authorize his use of information to assist other clients as a condition of his representation.

This is one of my favorite questions and a great one for research as well as analysis. The first question is whether such a confidentiality agreement would be binding on the attorney at all. Enforcing these confidentiality agreements against attorneys to create some ongoing duty of loyalty to an opposing party violates Rule 5.6(b) ("restrictions on right to practice"). However, where using this information would harm a former client, even if that would be by causing that client to breach the agreement, then of course there would be a basis for a conflict. But the

conflict is not because of the confidentiality agreement, it is because of the duty to preserve a former client's confidential information and not disclose it or use it in a way that would harm the client.

As a preliminary matter, I question the circumstances in which an attorney would be a party to such an agreement at all. It may be one thing for a party to agree not to disclose information gained about an opponent, but to have an attorney be a party to that agreement is a separate matter entirely. Attorneys may not enter into agreements that restrict their right to practice. ABA Model Rule 5.6. In ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 00-417 (2000), the committee explained the policy behind that rule:

> First, permitting such agreements restricts the access of the public to lawyers who, by virtue of their background and experience, might be the very best available talent to represent these individuals. Second, the use of such agreements may provide clients with rewards that bear less relationship to the merits of their claims than they do to the desire of the defendant to "buy off" plaintiff's counsel. Third, the offering of such restrictive agreements places the plaintiff's lawyer in a situation where there is conflict between the interests of present clients and those of potential future clients. While the Model Rules generally require that the client's interests be put first, forcing a lawyer to give up future representations may be asking too much, particularly in light of the strong countervailing policy favoring the public's unfettered choice of counsel.

ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 00-417 (April 7, 2000). The ABA Opinion concluded that these same policies apply to agreements that limit an attorney's ability to use information obtained about the opposing party against that same opposing party in another suit. The opinion reasoned that "this proposed limitation effectively would bar the lawyer from future representations because the lawyer's inability to use certain information may materially limit his representation of the future client and, further, may adversely affect that representation." *Id.*

The opinion distinguished an agreement that prohibits the attorney from disclosing information gained during the representation. "A proposed settlement provision, agreed to by the client, that prohibits the lawyer from disclosing information relating to the representation is no more than what is required by the Model Rules absent client consent, and does not necessarily limit the lawyer's future practice in the manner accomplished by a restriction on the use of information relating to the opposing party in the matter. Thus, Rule 5.6(b) would not proscribe offering or agreeing to a nondisclosure provision." *Id.*

Just as it would be unethical for an attorney to agree to refrain from using information from one suit in a subsequent action against the opposing party, likewise, it would be unethical for an attorney to request such a settlement term. Recall that Model Rule 8.4(a) provides that it is unethical for a lawyer to induce another lawyer to violate a rule. *Adams v. BellSouth Telecomms.,*

Inc., 2001 WL 34032759 (S.D. Fla. Jan. 29, 2001)(attorneys ordered by court to take 5 hours of ethics instruction for requesting opposing counsel to agree to a confidentiality term that would have restricted their right to practice). In *Hu-Friedy v. Gen. Elec. Co.*, 1999 WL 528545 (N.D. Ill. 1999), attorneys (HH&J) for Chevron sued General Electric and obtained information about GE under the terms of a protective order issued during discovery. The order provided that all "confidential materials shall be used and disclosed solely for purposes of the preparation and trial of this case and shall not be used or disclosed for any other purpose." When the case settled the parties and attorneys entered into a separate "cooperation agreement" which stated that "Defense Materials will be used by the Parties and their Counsel" in limited ways. The attorney then sued General Electric on behalf of another client with a similar claim and GE moved to disqualify arguing that the attorney would inevitably be "using" the information that was under seal from the previous case. The court denied the disqualification motion, reasoning that neither the protective order nor the cooperation agreement created a conflict:

> In effect, GE's argument turns any protective order barring future use of the confidential information that is independently relevant and discoverable in a subsequent action into a restriction on an attorney's right to practice law…. GE's interpretation of the protective order and cooperation agreement is contrary to the policy of Rule 5.6(b). Moreover, the information GE seeks to prevent HH & J from using is relevant to this case, and any reasonably competent attorney would routinely obtain it in discovery. Therefore, HH & J has no unfair advantage in this action due to its previous exposure to the confidential information. The "head start" argument does not persuade us to the contrary. GE does not deny that another attorney would eventually be able to understand the materials in question. Its point is simply that another attorney would have to spend time that HH & J, by virtue of its exposure in Chevron, would not have to spend. The unstated premise of the argument seems to be that it is unfair for Hu-Friedy not to have to pay other counsel to duplicate the work that HH & J did in Chevron. The argument is unimpressive, but any merit it might have is far outweighed by the policy of avoiding unnecessary and unworkable restrictions on the practice of law.

Id. at *3.

Despite the ethical risk in entering into these agreements, and the fact that the Restatement indicates that these types of agreements are unenforceable against attorneys, attorneys have entered into these secrecy agreements and courts have used those agreements as a basis for disqualification. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 13(2) (2000). A recent example is *In re Mitcham*, 133 S.W.3d 274 (Tex. 2004), in which a law firm settling an asbestos case against a company agreed not to "share" any information about that company's use of asbestos. Four years later, one of the firm's attorneys filed an asbestos suit against the company. Without mentioning Texas Rule 5.06(b) (Texas' version of Model Rule 5.6(b)), the court granted a disqualification motion, saying:

> Even if Waters would otherwise have been free to bring asbestos claims against TXU … his confidentiality agreement precludes him from doing so. Because Waters cannot give the Mitchams the representation to which they are entitled without mentioning facts surrounding TXU's use of asbestos (which his agreement precludes him from doing), he and the members of his firm are disqualified.

Id. at 277.

4. Closure

An effective way to close this class is ask students to list the basic steps in conflicts analysis (followed by a reference to comment 2 to Rule 1.7).

Chapter Sixteen: An Attorney's Own Interests in Conflict with the Client's

Outcomes, Assessments, and Assignments

Outcome 16-a: Reading and Analyzing Lawyer Regulation

In evaluating a proposed fee agreement or other business relationship with a client, they should be able to determine whether that arrangement is prohibited and, if not prohibited, how to structure the relationship in a way to reduce the risks of discipline and liability.

Reading Assignment:

Chapter 16.

Assessment:

The review problems in the chapter all can be used as a basis for assessing student understanding of the Rule 1.8 prohibitions.

Outcome 16-b: Formation of Professional Identity

Students should be able to identify the inherent risks of conflicts of interest that exist in the attorney-client relationship in the area of law in which they intend to practice and should be able to reflect upon and articulate how they can achieve a reasonable balance of their own personal interests and those of their clients.

In evaluating their personal interests, they should be able to articulate the circumstances in which those interests would materially limit their willingness or ability to protect their client's interest.

Reading and Reflection Assignment:

Section 16.4 and Reflective Practice Problem pages 377-78.

Mendoza Toro v. Gil and the problem preceding it focus on the situation in which an attorney finds the client's objectives repugnant.

The reflection exercise on page 377-78 asks students to reflect on this situation and decide where their own personal lines are.

Assessment:

See appendix for additional guidance on using reflection.

Outcome 16-c: Researching Issues in Professional Responsibility ⓘ

Students should be able to find policies and purposes behind rules of professional conduct.

Research Assignment:

Research 16-A, page 367-68: Finding Policies and Purpose is an excellent research review exercise.

Assessment:

At a minimum, students researching the case law should uncover cases in which attorneys have been disciplined, even when they have acted for purely humanitarian reasons: *State ex rel. Oklahoma Bar Ass'n v. Smolen*, 17 P.3d 456 (Okla. 2000)(providing thorough review of the history and purposes of the rule and the variations across the states). A recent article on the subject would be *See generally* Danielle Z. Cohen, *Advancing Funds, Advancing Justice: Adopting the Louisiana Approach*, 19 GEO. J. LEGAL ETHICS 613 (Summer 2006).

Outcome 16-d: Practice Management 1 and Communication Skills

Students should be able to document basic business transactions with a client to meet the standards of Rule 1.8(a)

Problem Assignment:

Professional Responsibility Skills 16-A: Documenting Transactions with Clients, pages 370-71.

Assessment:

See classroom activity 3 below.

Suggested Classroom Learning Activities

1. Set Up: Overview of Rule 1.8

(Section 16.1, Outcome 16-a)

The text suggestions that "Because Rule 1.8 is a collection of rules, some of which are prohibitions and others regulation, one of the most helpful steps you can take to master this rule is to simply divide up the list into these two categories." This makes a good warm-up exercise.

Absolutely Prohibited (even with client consent)	**Prohibited absent client informed consent**	**Regulated beyond merely informed consent**
1.8(c) soliciting gifts and testamentary dispositions or preparing instruments for these gifts	1.8(b) using information to disadvantage a client	1.8(a) doing business with client
1.8(d) media rights	1.8(g) aggregate settlements	1.8(f) third party payors
1.8(e) financial assistance to clients		1.8(h) limiting malpractice
1.8(i) acquire proprietary interest in cause of action		
1.8(j) sexual relationships		

2. Quiz: Rule 1.8 Basics

(Chapter 16, Review Problems pages 378-79; Outcome 16-a)

Using the review problems at the end of the chapter as a short quiz permits review of several rules in efficient fashion. I have written a CALI lesson to review these problems, which I am happy to provide to faculty for use either in class or for students to complete on their own.

1. Drafting the will

The question is whether the aunt is "related to" the attorney or maintains a "close familial relationship" for purposes of Rule 1.8(c). *Cooner v. Alabama State Bar*, 59 So. 3d 29, (Ala. 2010), said "related by marriage" is related for purposes of the rules.

However, just because Rule 1.8 doesn't prohibit your drafting this will, doesn't mean it is a wise choice. The fact that the will basically disinherits the sister means it will be open to question. If you draft the will, you are handing the sister an undue influence claim. Much better to simply refer your aunt to another attorney.

2. Recovering paintings

Rule 1.8(i), which prohibits taking a proprietary interest in the cause of action, does not apply because Dolores does not own the paintings until after she recovers them. Similar to the ban on providing financial assistance to litigation clients, this rule has its origins in the common law doctrines of champerty and maintenance. If attorneys own the cause of action, they may control over settlement decisions or otherwise exert control over the case to serve their own, rather than their client's interests. Shared ownership of a cause of action may discourage the client from dismissing the attorney. See, for example, *In re Shaw*, 443 A.2d 670 (N.J. 1982), where the lawyer essentially "purchased" a client's personal injury case.

In contrast, this is really a contingency fee being paid in the form of property. Contingent fees are an express exception to the Rule 1.8(i) prohibition. The only way she would be subject to discipline is if it was not in writing as required by Rule 1.5.

Here again, simply because the rules do not appear to expressly prohibit this type of arrangement, there may be good reasons not to work this way. If Valerie refused to give Dolores any of the paintings, Dolores might have a good deal of difficulty enforcing their agreement. Valerie might disagree with Dolores's choices of paintings and a court might not be as sure that the rules permit this arrangement or that it is a reasonable one.

If a fee agreement violates the rules of professional conduct, courts are split on the question of whether that also means that the contract is unenforceable. However, many times, the reason the fee agreement violates the rules is the same reason it would be unenforceable as a matter of contract law (e.g., unconscionability).

This would likely be an enforceable agreement IF Dolores can prove it, but she should take the greatest of care in drafting the agreement that it is clear, fair, and the product of truly informed agreement.

Should the attorney have agreed to this fee arrangement? The reasons not to may outweigh the reasons to. CON: disputes about the choices, possible questions of ethical propriety or enforceability, PRO: great business deal

3. The romance

While maintaining the sexual relationship with his client is not expressly prohibited, the manner in which Sal initiated it is problematic because he induced her by waiving all legal fees she incurred during representation. This is a conflict of interest because he is asserting his desires of the flesh ahead of his fiduciary duties as a professional; his personal choices are interfering with the representation. Essentially, his sexual predilections have tainted his ability to make professional judgments. Furthermore, Sal was the aggressor in the relationship—showing up prematurely with champagne and a toothbrush would offend the tastes of any woman, especially one who just suffered a heinous divorce and would violate Rule 1.8(b), which prohibits an attorney from using information relating to representation to the disadvantage of the client.

Suggesting sexual relations in lieu of payment itself is a blatant violation of the rules of conduct because Sal's interests are materially adverse to the vulnerable divorcee. Arguably, this is a violation of 1.8(e): "A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation." The client here does not meet the exceptions because the repayment isn't contingent upon any condition nor is the client indigent. Therefore, the attorney cannot ethically waive fees in exchange for sex and is subject to sanction.

The sexual relationship limits the attorney's ability to protect the client's confidential information because conversations may not be protected by privilege when they may be in the context of a personal rather than professional relationship. The relationship is incompetent because it risks the client's legal interests (the affair could be used as evidence against the wife in a state in which fault can be raised in a divorce). Finally, the relationship limits the client's ability to direct the representation (certainly she's unlikely to be considering reconciliation, for example), including the decision to fire the attorney. She may be afraid that if she refuses sex, he will withdraw from the representation or, conversely, if she has fallen in love with him, she may be afraid to question his representation or fire him, for fear he will end the relationship. *In re Berg*, 955 P.2d 1240 (Kan. 1998) (lawyer disbarred for sexual relations with vulnerable divorce clients).

4. The patent

Rule 1.8(i) could potentially play a role in this question, as it states that "a lawyer shall not acquire a proprietary interest in the cause of action or subject matter of the litigation the lawyer is conducting for the client…"

Obtaining a patent for a client is not considered litigation. In fact, the US Patent and Trademark Office has carved out an exception in 37 C.F.R. § 10.64(a)(3), which states that, "[i]n a patent case, [the practitioner may] take an interest in the patent as part or all of his or her fee."*See also Beatie v. DeLong*, 164 A.D.2d 104, 106 (N.Y. App. Div. 1990) (holding the attorney's interest in the patent to be valid as long as it was fair and reasonable); *In re Cook,* 526 N.E.2d 703, 708 (Ind. 1988) (holding that it was not impermissible for the attorney to acquire a proprietary interest in the patent); *In re Engage, Inc.*, 2005 U.S. Dist. LEXIS 18849 (D. Mass. 2005) (holding that "[b]y carving out an exception for attorney's liens from the general prohibition against practitioners 'acquiring a proprietary interest' in patent claims they prosecute for clients in the USPTO, the USPTO itself clearly indicated a policy choice permitting attorney's liens 'granted by law.'").

Should you agree to this arrangement?

Once it is determined that taking an interest in the client's patent is permissible, the attorney then needs to make a decision as to whether or not it would be good business to take such an interest. Pertinent considerations include:

- the likelihood of commercial success of the invention
- the possibility of losing future litigation rights for that client
- enforceability of the client's obligation to the firm

5. The media deal

First part: The attorney should not accept this deal even if he's working pro bono because Rule 1.8(d) strictly prohibits a lawyer from making or negotiating an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

Suppose instead, attorney represented client pro bono. Client lost in the trial court but was vindicated on appeal. The case is now over. Attorney has now been asked to serve as consultant on the preparation of a documentary film for immediate release on television. The film will be based on Client's case.

May attorney take the deal?

Once the proceedings are all over, and you no longer have an interest in the outcome, the lawyer may accept the deal (so long as he has client permission) because he no longer has an interest in the case.

Should attorney accept this deal?

Only if he is confident that it would not harm the client. Even if the client consents to the disclosure of confidential information, that consent can be withdrawn and the scope of the consent called into question when the client later decides he didn't like the movie.

3. Researching for Policies

(Research Problem 15-A, pages 367-68; Outcome 16-c)

The problem asks students to research the application of Rule 1.8(e) regarding financial assistance in the context of a good hearted attorney who wants to help out a juvenile client by paying some tuition to keep him in the school. There are two aspects to this problem. First, this problem almost inevitably engages students in efforts to "quibble" over the meaning of the language in the rule (as described on pages 366-67 regarding drafting a will that leaves the attorney money). Students might argue that the tuition, because it would result in a better situation for the client in the dispositional phase, is actually a "litigation expense." Best to call this for what it is—an attempt to stretch the rules to cover what the attorney believes is morally right—rather than an attempt at serious analysis.

Researching the question can help students to discover that the intuitively obvious result (that it's okay to help your client) is not so obvious upon reflection. The ABA/BNA Lawyer's Manual provides the following explanation:

> The current ethics restrictions on financial assistance to litigation clients are traced to the common law prohibitions against champerty (investing in another person's litigation in exchange for part of the recovery) and maintenance (supporting another person's lawsuit). The rules against champerty and maintenance evolved to prevent third parties from stirring up needless litigation and to protect commoners against powerful land owners. Although those doctrines have been abandoned in some states, they are alive and well in other jurisdictions.

Financial Assistance to Clients, 51 Law. Man. Prof. Conduct 801 (2013).

Students researching the case law should uncover cases in which attorneys have been disciplined, even when they have acted for purely humanitarian reasons: *State ex rel. Oklahoma Bar Ass'n v. Smolen*, 17 P.3d 456 (Okla. 2000)(providing thorough review of the history and purposes of the rule and the variations across the states).

4. Drafting Business Agreements

(Skills Problem 16-A: Documenting Transactions with Clients, pages 370-71; Outcome 16-d)

Be sure students don't overlook the first two preliminary questions: "Is Phillip a client?" and "Is this a business transaction or is the lawyer acquiring an ownership interest adverse to the client?"

I break down the elements in this fashion and then ask students to annotate the letter to indicate where the letter attempts to address each element.

A. Are both the transaction (procedure) and terms (substance) of the transaction fair and reasonable to the client? Rule 1.8(a)(1) (cf. Rule 1.5—is the fee reasonable?).
B. Are the terms fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client? Rule 1.8(a)(1).
C. Was the client advised in writing of the desirability of seeking counsel? Rule 1.8(a)(2).
D. Was the client given a reasonable opportunity to do so? Rule 1.8(a)(2).
E. Did the client give informed consent to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction? Rule 1.8(a)(3).
F. Was this consent in a writing signed by the client? Rule 1.8(a)(3).

Students should be able to discuss where each one of these factors is addressed in the letter and how well. Some students will ask whether 1.8(a) applies when the transaction is actually a method for payment of fees. The answer is clearly yes. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 02-427 (2002); *e.g., In Re Snyder*, 35 S.W.3d 380 (Mo. 2000)(attorney suspended for six months for taking an interest in a client's real estate in lieu of a cash fee to defend a criminal proceeding without following the requirements of Rule 1.8(a)).

5. Problem and Case Discussion

(Section 16.4, pages 372-73; Outcomes 16-a and 16-b)

The preliminary problem in this section is designed to lead into a discussion of *Mendozo Toro v. Gil.*

In the *Mendoza Toro v. Gil* case on pages 373-77, the attorney Lilliam Mendoza Toro refused to prosecute persons trespassing on the Naval base. Mendoza Toro's personally believed that these actions were immoral and refused her supervising attorney's directions to bring the actions. She brought an action against her employer asking for an injunction restraining the U.S. Attorney from assigning her to these cases. In addition to arguing that requiring her to prosecute these actions would violate her First Amendment rights, she also asserted that prosecuting these cases when she morally objected to them would constitute a conflict of interest.

The district court disagreed, holding that her petition failed to state a claim upon which relief could be granted and dismissing the action.

According to the court, the proper action for Ms. Mendoza Toro, if she felt so strongly that she could not competently represent the government in these actions, would be to withdraw from the representation. Rule 1.16(b)(4) which provides that an attorney may withdraw if "the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement" would provide at least one basis for that withdrawal.

However the court concludes that Ms. Mendoza Toro could not claim that she could both keep her job and refuse this prosecution under the theory that she faced a conflict of interest. The court concluded that "there is not a conflict merely because an attorney does not believe in her client's position."

I ask the students to consider why they think the court takes this position? The question helps students think about the interaction of Rules 1.2, 1.7, 1.16, and 2.1. I suggest that perhaps the court was concerned that such a principle would be overbroad. After all, many attorneys represent clients whose causes they do not believe in. As the court points out, Rule 1.2(b) indicates that representation of a client does not constitute an endorsement of the client's views. Likewise, Rule 2.1 permits attorneys to bring their own personal (and presumably differing) views to bear on the advice they provide a client. If the court held that an attorney could never represent a client if he or she did not believe in the client's case or objectives, attorneys would be facing conflicts of interest on a regular basis.

Perhaps the court did not really mean that personal interests or views could never provide a basis for a conflict of interest, but was inartfully trying to make the point that these objections to a client's goals do not justify overriding the client's goals. The attorney must pursue the client's goals OR withdraw under Rule 1.16, but may not have her cake and eat it too by refusing the client's directives while taking the client's paycheck.

I ask about whether, if the result would change if Mendoza Toro felt so strongly about these prosecutions that she was losing sleep, could not form an adequate theory of the case, or continually argued with her co-counsel and witnesses for the prosecution about their goals and strategy. Courts in other instances have held that disagreement with client over strategy can be a conflict of interest. *Heck-Johnson v. First UNUM Life Ins. Co.,* 2006 U.S. Dist. LEXIS 26265 (N.D.N.Y. May 4, 2006). I ask students "What is the phrase from Rule 1.7 that would justify this conclusion?" The answer of course is "materially limited".

What one can see from this case is that, under Rule 1.7, any personal interest could constitute a conflict of interest if it significantly threatened to materially limit an attorney's ability to fulfill the fundamental duties of competence, diligence, communication, and confidentiality.

I then ask students to brainstorm and practice how they might approach an employer if you felt that their personal beliefs would limit their ability to represent a particular client?

7. Closure: Making it Personal

(Reflective Practice Problem pages 377-78)

For a closure, I often ask students to write a 1-2 minute anonymous paper in which they identify the area of practice they hope to pursue and the potential personal conflicts they might face in that practice.

Alternately, you could assign the reflective practice essay in which students are asked to reflect on how they would handle Lilliam Mendoza Toro's situation.

The experiences of the military attorneys in the Guantanamo military commission make extraordinary examples of personal morals and professional ethics. Lt. Cmdr. Charlie Swift makes an especially compelling example. Using the NPR interviews http://www.npr.org/templates/story/story.php?storyId=5751355 and http://www.npr.org/tem plates/story/story.php?storyId=6256039 can be especially compelling. Using this as a focus for class is the brainchild of Professor Clark Cunningham. To see his presentation at the Fall 2013 NIFTEP conference, go to the website of the National Institute for Teaching Ethics and Professionalism.

Chapter Seventeen: Conflicts of Interest and the Problem of Client Identity

Outcomes, Assessments, and Assignments

Outcome 17-a: Reading and Analyzing Lawyer Regulation 

Students should be able to identify and reduce the risks of having a conflict of interest arise from common situations of client ambiguity, including the risks of conflicts of interest arising from prospective clients and third-party payors.

Assignment:

I sometimes choose to address only the first two sections, leaving the insurer/insured problem for rule reading only. Alternately, you may wish to dispense with the cases and assign the narrative in each section only.

Assessment:

For any given area of practice, can students describe a most common situation in that practice area in which someone might think they are a client. For example:

1. You are a public defender appointed to represent a defendant charged with robbery of a fast-food restaurant. Who is your client? Who else in that representation might believe you represent them also?

Others charged with the crime; Witnesses, third-parties paying for the defense.

2. You are prosecuting the restaurant robbery. Who is your client? Who else in that representation might believe you represent them?

Client is the defendant; Others who might believe they are represented are the victims of the robbery, store owner, officials in other branches of government.

3. You represent a group of passengers in an airline crash in a negligence class action against the airlines. Who is your client? Who else in that representation might believe you represent them also?

Client are the members of the class (though the named class representatives direct the representation); Others who might believe you represent them are victims of the crash who are not in the class, Family members of the injured, insurers.

4. You have been hired by in-house counsel of a hospital to provide defense in a medical malpractice case involving a surgical error. Who is your client? Who else in that representation might believe you represent them also?

The hospital is your client; Others whom you might represent or who might believe you represent them could be the surgeon or any member of the surgical staff, the hospital risk manager, the insurer.

5. You an attorney in the state division of child support enforcement providing paternity establishment and child support establishment and enforcement for custodial parents. Who is your client? Who else in that representation might believe you represent them also?

The client, according to statutes in nearly every state, is the division or department of the state – not the parents – though they would be likely to believe you represent them.

Outcome 17-b: Practice Management 1

Students should be able to draft effective disclaimers while recognizing the limits of their effectiveness

Assignment:

Professional Responsibility Skill 17-A: Disclaimers and Electronic Communication (page 387).

There are several ways to assign this problem. You could ask students to critique the disclaimers in the text, to find law firm websites that they think strike an effective balance, or, as the problem suggests, design their own website. You can also assign this as a research problem, asking students to identify whether your state requires any particular disclaimers on web pages (or other advertisements). This can be a quick and easy way to get the students into your state's code of professional conduct, as well as preview the advertising restrictions covered in Chapter 26.

Assessment:

Students should perceive that effectiveness of disclaimers can be inversely proportional to the marketing effectiveness of the site to which they are attached.

Outcome 17-c: Practice Management 1

Students should be able to bring and defend a disqualification motion.

Assignment:

Introductory Problem (pages 382-84) Role Play (See #3 below)

Assessment:

A quick assessment of the ability of the students to translate standards into evidence could be based on the number and variety of questions asked. A more elaborate assessment would ask students to complete the following chart:

Element of law	Evidence sought	Questions to ask
For example: purpose of discussions was seeking legal advice	Client expressly or implicitly asked for help with the problem	Did you ask Allwell for advice? If Allwell offered you advice, what did you say?

Outcome 17-d: Formation of Professional Identity

Students should be able to describe the reasons that attorneys find it difficult to limit the influence of third parties who pay for representation.

Assignment:

If you wish to explore the details of the insurer-insured relationship, assign the *Brown v. Keton* case (page 394-99); otherwise, you can simply assign the narrative that proceeds the case (17.3 Third-Party Payors page 393-94) and use the more accessible problem of family members paying for a representation to engage students in discussions or role plays of how to address this influence.

Assessment:

I have used the problem introducing this section as a basis for a brief role play of a conversation with the adult paying for a juvenile's representation. This can help students to appreciate the difficulty these situations present. The Ohio statement of client rights on page 400-401 can be used as a guide to the content of these conversations.

Outcome 17-e: Researching Issues in Professional Responsibility ⓘ

Students should be able to formulate an efficient plan for locating state authority on a specified issue.

Research Assignment:

Researching Professional Responsibility 17-A: Research Problem 401

Assessment:

A good secondary sources for researching the issue is Michelle Brown Cashman, Annotation, *Propriety of Insurers' Use of Staff Attorneys to Represent Insureds*, 2 A.L.R.6TH 537 (2005).

Suggested Classroom Learning Activities

1. Set Up: Review Rules on Client Formation and Prospective Client Conflicts
(Graph Rule 1.18, page 386; Outcome 17-a)

I begin this class with a worksheet for the students to complete, which allows them to review their knowledge of the rules. As with most of these "state the rule" exercises, they must work from memory only.

- Attorney and client AGREE to the representation
- Attorney is APPOINTED to the representation
- Client reasonably ASSUMES that the attorney is acting on his or her behalf based on:
  - ❑ _____
  - ❑ _____
  - ❑ _____

When will a prospective client create a conflict of interest?

- IF the purpose of the consultation is to consider legal representation

  AND the attorney obtains

  _____

- THEN there is a conflict with:

  clients who are

  _____

  and matters that are

  _____

What exceptions?

- EITHER

  _____

- OR

  - ❑ _____
  - ❑ AND_____
  - ❑ AND_____

When is someone a client?

i) Agreement

ii) Appointment

iii) Client reasonably assumes that the attorney is representing him/her/it

  (1) Confidential information shared

  (2) Advice given

  (3) Reasonable reliance or foreseeable that client would rely

IF an individual speaks with the attorney about the possibility of the attorney representing him or her

AND the lawyer received information from the prospective client that could be significantly harmful to that person in the matter,

THEN the attorney may not represent a client with interests materially adverse to those of the prospective client in the same or a substantially related matter

UNLESS

  EITHER both the affected client and the prospective client have given informed consent, confirmed in writing;

  OR the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client,

    AND the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;

AND written notice is promptly given to the prospective client

2. Overview of Disqualification

I provide students a short lecture on disqualification to help frame their understanding of conflicts, followed by a brainstorming exercise to identify the policies driving this area:

Representing a client when you have conflicting interests with that interest presents a number of risks: discipline, loss of fees, tort liability, and , most commonly, disqualification.

The power to disqualify counsel is part of a court's inherent power to control its proceedings. Disqualification decisions are reviewed on an abuse of discretion standard and are not necessarily controlled by the rules of professional conduct. "Although disqualification ordinarily is the result of a finding that a disciplinary rule prohibits an attorney's appearance in a case, disqualification never is automatic…. the court should disqualify an attorney only when it determines, on the facts of the particular case, that disqualification is an appropriate means of enforcing the applicable disciplinary rule." *United States v. Miller*, 624 F.2d 1198, 1201 (3d Cir. 1980).

Nonetheless, there is an important relationship between disciplinary rules and disqualification standards.

First, absent some strong weight on the scale against disqualification, if an attorney's representation violates the conflict of interest rules in that court's jurisdiction, the court will likely disqualify the attorney.

Second, disqualification motions are the laboratory in which the standards for conflicts of interest evolve. Those common law developments then influence rule makers when adopting or amending the disciplinary rules of conduct for attorneys (whether the ABA in drafting the Model Rules of Professional Conduct, the ALI in drafting the Restatement (Third) of the Law Governing Lawyers, or the state and federal courts in adopting one or the other of these standards as their court rules for attorneys).

Third, while a court's ruling on a disqualification motion neither precludes nor guarantees discipline for that same conduct, it is strong evidence that will influence disciplinary authorities.

Because disqualification motions are the most common way in which courts enforce conflict of interest standards, this lesson reviews conflicts from that perspective. Courts must balance a number of factors when deciding on disqualification motions.

Q. Think of what reasons a court would give when granting or denying a disqualification:

In Favor of Disqualification

- Client confidentiality
- Loyalty to clients
- Validity and stability of judgments
- Appearance of integrity of litigation

Against Disqualification

- Delay of proceedings
- Costs of proceedings
- Principles of estoppel
- Client choice of counsel

While any one of these factors might weigh for or against disqualification in any given circumstances, in general, courts grant disqualification motions in order to protect the interests of the movant (who may be a current or former client of the attorney or this firm). These interests are confidentiality and loyalty. Courts are also concerned that permitting attorneys to represent clients when there appears to be a conflict undermine the appearance of fairness and integrity of the judicial process.

The most difficult of these factors to categorize is the stability and validity of judgments. If a court grants a disqualification motion, it may not be immediately appealed, but must await a final judgment on the merits. The motion to disqualify is reviewed on an abuse of discretion standard. Even if the court's decision was in error, it will many times be harmless error if the client was able to secure alternative representation. On the other hand, if the court denies a disqualification motion and the movant loses, on appeal it may be much easier to prove that permitting the attorney who had a conflict to continue in the case was an abuse of discretion and reversible error. For that reason, the factor of validity and stability of judgments weighs most often in favor of disqualification, because the judgment will be more easily reversed from a denial of disqualification than from granting the motion.

Courts refuse to grant disqualification, even when conflicts may technically be present, if the costs outweigh these concerns. The costs of disqualification are delay, disruption of the proceedings, and the denial of a client's choice of counsel. Sometimes estoppel principles will lead a court to deny disqualification, as when an individual is aware that opposing counsel has a conflict but does not raise the issue until a strategically costly stage, such as on the eve of trial.

In terms of procedure, the person moving for disqualification bears the burden of proof. The decision is in the sound discretion of the court. Motions to disqualify are often accompanied by affidavits and sometimes require evidentiary hearings.

3. Role Play: Disqualification Motions and Procedure

(Preliminary Problem, pages 381-84; Outcome 17-a and 17-c)

The preliminary problem, based on *Miness v. Ahuja*, 762 F. Supp. 2d 465, 479 (E.D.N.Y. 2010) (pages 382-84), can be used to outline the disqualification procedure and would make an excellent mock deposition or hearing testimony exercise. You can question a student, who would play the role of the potential client, or you can play that role and ask students to examine and cross examine you, or, if you assign the problem as a role play early enough, you could ask students to play all roles. The affidavit provided in the text is based on the actual affidavit in the case (though very simplified) and the opinion recounts much of the testimony of both the plaintiff and the attorney, including extensive excerpts from the hearing transcript.

The court concluded that disqualification was necessary because the plaintiff had a close personal relationship with the defendants' attorney, had confided in him about the facts underlying the case, and the attorney had frequently offered his services in response. That was sufficient to make the plaintiff a Rule 1.18 prospective client (though the court does suggest that its ruling was limited to the facts of this case). The court noted that, especially in trial, the attorney's "first-hand knowledge of the plaintiff's intimate thoughts and actions at the time of the relevant events could substantially and unfairly provide his clients with an advantage. The most likely example Court can perceive of is an unfair cross-examination of [plaintiff] by [Attorney], based on [Attorney's] knowledge of the personal feelings and thoughts of [plaintiff]."

The attorney had argued that he had not obtained "confidential" information because many of his discussions with the plaintiff at the golf club had been in the presence of a third non-attorney friend. The court rejected that argument,

> the presence of a third party does not necessarily mean that, for the purpose of Rule 1.18, the information shared with [Attorney] is not confidential. Rule 1.18 is not a rule of evidence, but rather governs the propriety of an attorney's representation of clients. Thus, to the extent that information gleaned from a potential client is "confidential" in the generic sense of the word—that is, the information is available only to a select group of intended recipients—then the Court views it as confidential for the purpose of Rule 1.18.

Miness v. Ahuja, 762 F. Supp. 2d 465, 481 (E.D.N.Y. 2010)

The court emphasized that one of the policy bases for its decision was the "the necessity of preserving the integrity of the adversary process….A party ought not to have to face in court an attorney whom that party treated as a personal confidante, and potential legal representative, with regard to the very matter being litigated." The court balanced this concern against the strong presumption against disqualification and the harm to the defendants the disqualification would cause. In particular the court noted that the attorney had never previously represented the defendants and that the reason the attorney was representing the plaintiffs was that someone at the golf club had recommended him and likely knew of the relationship between the plaintiff and

the attorney. The court suggested that "a reasonable party, before retaining [Attorney], even if unfamiliar with the relevant ethical rules, would have considered the potential conflict that [Attorney] faced in representing the defendants in this matter." *Id.* at 482.

4. Managing Prospective Client Conflicts

(The Beauty Contest, pages 386-87; Outcome 17-a, 17-b)

I ask student how they might prevent a conflict through the use of waiver in these situations. I then direct their attention to the following letter is from frievogelonconflicts.com and ask their opinion on its use. Some students will recognize that, even though one could obtain waiver, one might be reluctant to ask for fear the potential client would then not even be willing to interview.

John Smith, Esq.
ABC Corp.
1 LaSalle Street
Chicago, Illinois 60603

Re: Proposed Action against XYZ Corp.

Dear John:

This is to confirm that you will visit this firm August 1. You wish to hire a law firm in this city to bring an action against XYZ Corp., and the purpose of your visit will be to evaluate the ability of this firm to handle the action for you. We understand that you will be interviewing other firms here, as well.

On the telephone, we discussed the possibility that if you do not hire us, XYZ or some other party in the action may seek to hire us in your case. We have agreed that at our meeting on August 1 you will not reveal any confidential information to us. We further agreed that nothing that occurs at the meeting will form the basis for an objection on your part to our representing one of the other parties in the action.

Thank you very much, and we look forward to our meeting.

Very truly yours,

Your name

5. Case Discussion

(Section 17.2, pages 387-393; Outcomes 17-a and 17-b)

Students will have examined Rule 1.13 already in the context of compliance counseling. Additional points to emphasize here are that the attorney may represent both constituent person and corporation (1.13(g)) and must clarify his or her role if there is ambiguity (1.13(f))). Call students' attention to the factors listed on pages 389-90 for whether a constituent person is a client.

This problem can also benefit from a brief role play, in which students are asked how they would explain their role to an employee who comes to them with a question about the employee's actions.

The GSI Commerce Solutions case focuses on entities and their constituent parts—when does representation of one part of a company (e.g. one affiliate of a parent company) include representation of another part (e.g. affiliate)? Students should be able to identify the key factors:

Degree of operational commonality;

Financial interdependence—loss for one would result in "substantial and measurable loss" to the other;

Ownership structure (wholly owned subsidiaries more likely to be part of parent company client); and

Common personnel and managers and especially common legal counsel.

Questions after the case ask students to grapple with the reality that consents can be very difficult to manage when representing entities.

Question 1 asks about the attempts at waivers in this case. I ask the students what lesson they will take away from the court's treatment of the blanket waivers and the suggestion that their very use would be unethical. Students should recognize (again) that attorneys should not overreach with their clients, attempting to secure waivers of conflicts that aren't waivable, and that a written waiver is no better than the client's understanding of the implications of that waiver secured through clear communication. I ask why this is especially difficult in the case of corporate waivers. Most students recognize this as yet another example of the challenges of there not being any one individual who speaks on behalf of the client.

Question 2 asks about in-house counsel representing both the entity and the subsidiary. The reason it isn't a conflict of course is the very reason that there is a conflict here: J&J and BabyCenter are so closely aligned as to be one company. BabyCenter shared the same legal department as J&J and it also relied on J&J for accounting, audit, cash management, employee benefits, finance, human resources, information technology, insurance, payroll, and travel

services. That wouldn't always be true of course, and students are asked to recognize that in-house counsel doesn't automatically represent subsidiaries and should be directing them to secure outside counsel if conflicts arise.

I also follow up with a question tying this section back to the confidentiality and privilege materials. I ask to consider the consequences for privilege if J&J and Baby Center were not the same client. For example, if an entity person in J&J shared legal advice provided to them by in house counsel with an entity person in Baby Center, the attorney-client privilege would be waived. The Association of Corporate Counsel provides a memo with advice on this issue at http://www.acc.com/vl/public/Article/loader.cfm?csModule=security/getfile&pageid=15957.

Question 3 addresses the issue of governmental unit representation. I ask students how they would clarify the identity of their client when working for various government entities. Students will often answer that they would ask their boss or look for a policy manual. A reminder that the rules defer to "other law" in determining the existence of the attorney client relationship may clue students to also recognize that state and federal statutes and administrative regulations will sometimes provide this clarity.

Question 4 is useful as a way to gauge student understanding. If students have some strong opinions, they have begun to appreciate the significance of conflicts analysis.

6. Role Play/Guest Speaker
(Section 17.3 pages 393-94; Rules 1.8(f) and 5.4(c); Outcome 17-a, 17-b, and 17-d)

Before (or even instead of) delving into the complexities of the insurer-insured tangle, I find it helpful for students to examine the issue of third-party payors in a more accessible setting: the influence of parents in representation of a juvenile. The law in this context is not clear or simple any more than the insurance context but the situation and the potential conflicts are factually much easier to access.

Ask students to volunteer to play the role of Frank, Jonny, and the attorney and demonstrate how they would handle the conversations regarding client identity, control of the representation, and confidentiality of information. The text provides a concise summary of the considerations students should address, but a brief demonstration of how those principles translate into practice is very helpful.

I have been looking for a good television or video portrayal of this problem, if you are aware of any. In the meantime, this can also be a great opportunity for a guest speaker to help students understand how this issue works in practice.

7. Case Discussion and Debate

(Section 17.3 pages 393-401; Outcomes 17-a)

Brown v. Kelton has two issues: whether insurance staff counsel representing insureds constitutes the practice of law by a nonlawyer (the insurance company) and whether there is a conflict of interest in this representation. The majority reaches only the first issue, while the concurrence outlines the second.

I chose this case because it provides a good opportunity to circle back to earlier material (unauthorized practice of law) as well as explore the basics of the complexity of the insurer-insured-attorney triad. If you don't wish to go back through the inherent authority/unauthorized practice issue, you might signal to students to focus only on the concurring opinion.

A good place to start on the second issue is to simply outline the potential conflicts that can arise in insurance defense work and ask students to explain how those situations might threaten the competent and diligent representation of the insured. Question #4, regarding insurance company "billing guidelines" is one such situation, though students should recognize that its impact is limited by the insurance company's duty to the insured to provide an adequate defense.

Other situations you might elicit from students or pose for their consideration include:

- Defending under a reservation of rights, such as when the plaintiff has brought multiple claims, some of which are covered under the policy and others are not, so that the insurer advises the insured that it will not indemnify claims that are not covered with the result that the attorney may defend covered claims more vigorously.
- Representing multiple insureds: for example, employer and employee are defendants in an accident. The conflict here is actually between the two insureds.
- Inadequate limits of liability: for example, the defendant insured has a very low policy limit and would be personally responsible for a verdict in excess of the policy) [insurance company has much less incentive to defeat the claim entirely, since the cost is minimal. However, students should know that in many states, the insurance company would be liable beyond the policy limits if there were indications of bad faith in the defense.
- Different views on settlement: for example, the insured wants to litigate to vindicate non-monetary interests and insurer wants to settle. Rule 1.2 requires that client be able to choose to settle or not; however, most insurance policies now provide client permission to insurance company to settle and also provide that if insured won't settle when insurance company wants to, insured is responsible for all further defense costs and adverse judgment in excess of settlement offer.
- Collusion between Defendant and Plaintiff (e.g., injured passenger is family member of insured driver). This is pretty much an insurmountable conflict requiring separate counsel. See, e.g., *Montanez v. Irizarry-Rodriguez*, 641 A.2d 1079 (N.J. 1994)

This case can be a basis for debate on some of the underlying policy issues outlined in Questions 1 and 2. These are good questions to assign to individual students ahead of time to be responsible for developing the debate points to present in class. The debate can help reinforce once again how economic dependence on one client can place enormous pressures on the attorney to overlook ethical issues that would threaten that relationship. This is true even for private practice attorneys who are hired by insurance companies. As Doug Richmond explains:

> Most insurance defense attorneys have an on-going relationship with their insurers, and they work hard at developing future business. Conversely, few defense attorneys enjoy continuing relationships with the insureds they are hired to represent. It is this strong and perpetual economic linkage between insurers and their regular counsel that most concerns courts and insureds.

Douglas R. Richmond, *Lost in the Eternal Triangle of Insurance Defense Ethics,* 9 GEO. J. LEGAL ETHICS 475, 482 (1996).

Student opinions on the Ohio rules on page 400-401 can help you to determine the extent to which students appreciate that this inherent pressure is difficult to counter, even with elaborate counseling of the insured, but that without this communication, there is little chance the insured will truly be acting as the client.

8. Closure

(Review Problem, pages 401-02; Outcomes 17-a, 17-b, 17-e)

This problem is based on an article I wrote about this particular client ambiguity. Barbara Glesner Fines, *From Representing "Clients" to Serving "Recipients": Transforming the Role of the IV-D Child Support Enforcement Attorney,* 67 FORDHAM L. REV. 2155 (1999). It can make an excellent research assignment as well as analytical problem as it raises many of the issues in this chapter including:

- The role of statutes in regulating the practice of law (every state has a statute that disclaims an attorney-client relationship between agencies and the individuals they represent).
- The costs of conflicts (the reason for these statutes is the prevalence of conflicts in these situations, making it much more expensive to provide attorneys).
- The costs to clients (if the clients can't reasonably expect confidentiality, this will dramatically affect the relationship with the attorney).
- The need for clear communication of role (the only way out of the thicket is very clear explanations of role and its significance).

Chapter Eighteen: Current Clients

Outcomes, Assessments, and Assignments

Outcome 18-a: Reading and Analyzing Lawyer Regulation

In evaluating a particular proposed representation or relationship, student should be able to determine whether the interests of two clients are adverse and if the interests of one client would materially limit their representation of another client.

Reading Assignment:

Chapter 18.

Assessment:

Conflicts analysis is difficult to assess beyond basic knowledge of the rules without rather complete facts. However, it can be effective to ask students to generate the questions or evidence that would be important in resolving a conflicts question.

Outcome 18-b: Communication Skills

Students should be able to identify the limits of client consent to conflicts and draft enforceable consents and joint representation agreements.

Assignment:

Professional Responsibility Skill 18-A: Agreements Concerning Joint Representation (pages 417-18). Ask students to role play an attorney whom Mr. Lee has sought out to review the letter and get advice about the waiver. Alternately, ask students to draft the waiver letter that would have avoided the attorney's troubles in the *A v. B* case discussed on pages 416-17.

Assessment:

The criteria for a waiver letter is provided in the problem. If using a role play, you can play the role of the employee and ask for further explanations of key items in the letter to assess understanding and skill in conveying that understanding.

Outcome 18-c: Formation of Professional Identity

Students should be able to describe their own personal conception of loyalty.

Assignment:

Reflective Practice: Loyalty to a Client (page 413).

Assessment:

See the appendix for suggestions on assessing reflective learning exercises.

Suggested Classroom Learning Activities

1. Set Up:

(Preliminary Problem pages 403-04; Outcomes 18-a)

This problem nicely highlights the no-win situation an attorney can be in if there is not a waiver of confidentiality between jointly represented clients. While the Massachusetts opinion concludes that the attorney should inform the employer, the reasoning is sometimes strained. Ultimately, the opinion relies on the reasoning described in the Restatement:

> In the course of withdrawal, the lawyer has discretion to warn the affected co-client that a matter seriously and adversely affecting that person's interests has come to light, which the other co-client refuses to permit the lawyer to disclose. Beyond such a limited warning, the lawyer, after consideration of all relevant circumstances, has the further discretion to inform the affected co-client of the specific communication if, in the lawyer's reasonable judgment, the immediacy and magnitude of the risk to the affected co-client outweigh the interest of the communicating client in continued secrecy. In making such determinations, the lawyer may take into account superior legal interests of the lawyer or affected third persons, such as an interest implicated by a threat of physical harm to the lawyer or another person. . . .

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 60, cmt. l (2000).

As far as the attorney's belief that the employer client would not want to know, the opinion suggests that "clients often do not wish to hear bad news from their lawyers, but it is not a good idea for a lawyer to decide to conceal adverse information from a client because of a surmise that the client wouldn't want to know the information in order to avoid the consequences."

Finally, in an exercise of "rewriting the hypothetical" the opinion suggests that the facts might warrant disclosure under Rule 1.6(b)(3): "If the employer approved filing of its petition on the basis of false information obtained from the worker and used in drafting the petition, Rule 1.6(b)(3) would, we believe, authorize Attorney to "rectify" the client fraud by informing the employer that the petition filed in its name contained false information."

The bottom line for the students to recognize is that there is no easy, clear, or good solution to the problem other than making sure it is addressed before the problem arises.

2. Analysis of Concurrent Client Problems
(Section 18.1- 18.2, pages 404-05, Rule 1.7; Outcome 18-a)

I find the hypothetical involving the representation of Imogene and the Bank on pages 405-06 to be an excellent introduction. Ask the students to discuss the costs and benefits that can arise from taking on the bank's representation. This should be sufficient to identify the key values in concurrent representation, such as confidentiality, loyalty, client choice, costs, and appearance of impropriety.

3. Case Discussion
(Section 18.2, pages 405-13, Outcome 18-a)

Diagramming the Dresser case can help students to recognize that conflicts are not always immediately apparent. I usually put the following facts on the board or overhead to frame the discussion:

Susman Godfrey represents Dresser

v. CPS—antitrust (dropped) & tortious interference with contract case involving compressor market in Saudi Arabia (since 1985)—scheduled for trial

v. Cullen Center, Inc. v. WR Gray (asbestos in a Dresser building) 1990—going to trial

Susman Godfrey asked to represent Drill Bits in an antitrust case—multi-district litigation

Susman Godfrey notifies Dresser that they may be a defendant

Susman Godfrey sues Dresser on behalf of Drill Bits

Dresser moves to disqualify.

Some Q&A on the case itself:

Q. Footnote one indicates that the attorney say the Drill Bits litigation as the chance of a lifetime. Why was that so?
A. Susman is lead counsel for the plaintiff's committee. Students are unlikely to appreciate the significance of this position. See the following explanation of the importance of being appointed to plaintiff's committee:

> Jeffrey R. Johnson & Tami Becker Gomez, *Federal Multidistrict Litigation: Background, Basics, Global Settlements, and Bellwether Trials*, 79 DEF. COUNS. J. 21, 26-27 (2012).

In addition, in some MDL proceedings, transferee court must also appoint members to a Plaintiffs' Steering Committee or a Defendants' Steering Committee. In an MDL, it is not uncommon for Plaintiffs' counsel to form allegiances or alliances with other Plaintiffs' counsel and to have many Plaintiffs' attorneys attempt to be recognized on the Plaintiffs' Steering Committee. This committee leads the strategic decision making for all Plaintiffs, performs much of the work on behalf of the MDL Plaintiffs, and essentially controls the litigation. Members of the Plaintiffs' Steering Committee, assuming the case ends in a global settlement, are known to be well-compensated for their efforts on the committee, and often will get a percentage of both federal and state court settlements in which the fruits of their efforts in discovery or in putting together trial packages are used by other attorneys.

Q. Margin questions ask about motivations of the parties. "Why didn't Susman Godfrey simply withdraw from representing Dresser when the Drill Bits conflict arose?"
A. Students might speculate that they left it up to their client, probably hoping they wouldn't have to join Dresser or that Dresser would consent. They were fooling themselves. But also see footnote 1 and the court's comment that this was purely self-interest.

Q. Why didn't Dresser fire its attorneys when the conflict arose rather than waiting to bring a disqualification motion?
A. It would cost them to fire Dresser (they were five years into a major suit against CPS) but not to "own" them by disqualifying them.

Q. What is the legal standard used by the court to determine the disqualification motion?
A. National standards of legal ethics, including consideration of the Texas rules, which provided exceptions for conflicts when "social benefits" offset "the appearance of impropriety" and the "balance clearly and unequivocally favored allowing such representation to further the ends of justice."

Q. Why was there a conflict of interest in this case when the Drill bits litigation did not appear to be related in any way to the litigation CPS litigation?
A. The court was motivated by the concerns of loyalty to the client and also by the appearance of impropriety.

Q. Compare the approach of the Dresser court to that in Wyeth.
A. Both applied a balancing approach. Wyeth describes the test as "carefully examine the totality of the circumstances, taking a balanced approach that includes evaluating the impact, nature and degree of a conflict."

Dresser examines:

- Appearance of impropriety in general,

- Possibility that specific impropriety will occur,
- Likelihood of public suspicion of impropriety that outweighs social interests served by lawyer's continued participation, and
- Lawyer's motive for the representation.

Wyeth approach looks at:

- attorney access to confidential info relevant to the case at issue?
- costs of new counsel and time to acquaint new counsel with facts?
- who was responsible for creating the conflict?
- are the two matters related in substance?
- are both matters presently active?
- were attorneys at issue involved in both matters?
- are matters being handled from different offices?
- are different client representatives involved?

Q. Question 3 highlights the "hot potato" doctrine but notes that a client's consent to withdrawal can eliminate this issue. What is the problem with obtaining that consent?

A. You are basically asking a client to permit you to continue to act against their interests by withdrawing from their current representation in favor of another client. It is difficult to imagine circumstances in which an informed client would consent to this; though the Wyeth case does present some of the factors that could make it reasonable to ask. According to the Restatement, the only circumstances in which withdrawal suffices to render a representation "former" in order to take advantage of 1.9 standards is when withdrawal "occurs at a point that the client and lawyer had contemplated as the end of the representation," if the client discharges the lawyer for a reason other than the conflict, or if other grounds for mandatory or permissive withdrawal exist and "the lawyer is not motivated primarily by a desire to represent the new client." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 132, cmt. c (2000),

Q. Question 4 asks about representing clients who are adverse when their economic but not legal interests are opposed to one another. Even though the rules provide that business competition alone does not make clients directly adverse (Comment 6, 26 to 1.7), attorneys are nonetheless nervous about these representations. Clients might pressure an attorney to agree not to help a competitor business in any way. Can an attorney agree to this limitation?

A. Perhaps. One question becomes how one client would know who else you might or might not represent in the first place. Certainly if there is no conflict, there is no reason for an attorney to be revealing the fact that they represent others. Rule 5.6 provides that an attorney may not restrict their right to practice as part of an employment agreement but that rule is really directed at covenants not to compete with other attorneys, not restrictions on representing clients. An agreement with a client to refuse representation of other clients, however, does threaten the attorney's independent professional judgment and, while an attorney may out of prudence decline representations that would make an important client upset, the question for students is

really how much of their loyalty they want to sell to clients beyond that which is required by the rules. Question 5 highlights this same issue—that conflicts rules and client perceptions of loyalty tend to pressure attorneys to practice in a specialized area for one or another side.

4. Representing Co-Parties in Litigation or Multiple Parties in Transactions
(Section 18.3 and 18.4, pages 413-417; Outcome 18-a)

The text steps the students through numerous examples of conflicts presented by representing multiple parties in litigation (Section 18.3) and in transactions (Section 18.4). To review this material, I first ask students why clients might prefer joint representation and what dangers joint representation presents.

- Pro
    - Less expensive.
    - "Circle the wagons" consistency of theory and evidence strengthens action.
    - Focus on commonality rather than conflict facilitates transactions and preserves relationships.
    - Client autonomy—allows clients their choice of attorney.
- Con
    - May be required to waive some claims or forego some theories.
    - Impact on attorney-client privilege.
    - For attorneys, representation of co-clients constitutes a prime source of malpractice claims and frequent source of discipline.
    - If conflict arises later that requires withdrawal, clients, courts and attorneys are all worse off than if the clients had begun with separate counsel or pro se representation.

I then ask them to identify the questions they would ask themselves to determine if a joint representation would present a conflict of interest. Some of the questions they should raise include:

i) Assess impact on loyalty—Would legal interests be compromised?

ii) Assess impact on confidentiality—Would waiver of privilege cause concern? Have parties agreed to waive confidentiality?

iii) Assess impact on client ability to direct representation—Do the clients have enough commonality of objectives? How likely are the clients able to each articulate their own interests—are there imbalances of power among the clients that would interfere with your ability to represent each equally?

iv) How likely is the litigation/transaction to be successful? What are the implications if the litigation fails or the deal falls apart?

v) If conflicts are potential rather than actual, what would be the effect if the conflict ripened? Can you take steps to reduce that possibility?

You can walk the students through various categories of joint representation to test their understanding, though generally, I rely on the reading and simply ask students if they have questions.

Co-defendants in criminal cases

- Joint representation is not a per se a conflict unless law otherwise prohibits (as it often does for example in capital cases).
- Courts police waivers carefully and have broad discretion to reject waiver.
- Ineffective assistance standards infer prejudice if proof of an actual conflict that affected the lawyer's performance.

Co-defendants in a civil case

- present similar risks as presented by co-defendants in criminal case except you can waive cross claims and can agree on how to split liability before the suit is filed.

Co-plaintiffs in litigation or co-parties in a transaction

- Most frequent error is to overlook potential conflicts and the risks from failure of the representation.
- Confidentiality consents can be withdrawn, so can never rely solely on waivers.
- Remember that Rule 1.7(b)(1) provides that an attorney may not obtain a waiver of conflict if the attorney does not reasonably believe that he or she can provide competent and diligent representation to each client.

Class Actions

- Attorneys represent only the named class representative.
- Rules for class certification mediate some of the conflicts issues—See Fed. R. Civ. P. 23(a)(4) and 23(g)(1)(B)(requiring that class representatives must "fairly and adequately" protect the interests of the class and that counsel can provide adequate representation.

5. Obtaining Consent to Conflicts

(Problem 18-A pages 417-18; Outcome 18-b)

I ask students to pretend that Mr. Lee has come to them for a second opinion regarding whether he should agree to the joint representation and has brought the letter in for their review. This helps students to question whether Lee would reasonably agree to its terms and therefore

see that the letter is not nearly as important as the facts underlying the letter. They should be asked to consider whether the letter adequately discloses all the facts, legal implications, possible effects, and other circumstances relating to the proposed representation.

I refer the students to the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYER § 202, cmt. c(i) (2000) for a checklist of factors that should be discussed with the client(s):

- Interests giving rise to the conflict,
- Contingent, optional, and tactical considerations and alternative courses of action that would be foreclosed or made less readily available by the conflict,
- Effect of the representation or the process of obtaining other clients' informed consent upon confidential information of the client,
- Any material reservations that a disinterested lawyer might reasonably harbor about the arrangement if such a lawyer were representing only the client being advised, and
- Consequences and effect of a future withdrawal of consent by the client, including, if relevant, the fact that the lawyer would withdraw from representing all clients.

The letter's "fudging" of the possibility of continuing to represent one client should generate discussion about how to end a joint representation. I ask students specifically to discuss what would happen in a settlement of this claim, drawing their attention to Rule 1.8(g) requirements. I also remind students that the clients have the right to withdraw their consent to joint representation at any time, and ask what the attorney would then do. Ordinarily, this would require that the attorney to then withdraw from both representations. Rule 1.16(a). The exception here is that the Restatement allows attorney to withdraw from an "accommodation'' client and continue to represent the regular client with advanced, informed consent, but not all jurisdictions accept this approach. *Koch v. Koch Industries,* 798 F. Supp. 1525 (D. Kan. 1992).

6. Simulation: Joint Representations

One of the ways I have found to best help students appreciate that conflicts among current clients require truly understanding each client's interest as well as their position is to engage students in an initial client interviewing exercise involving a step-parent adoption. Here are the basic facts for the exercise. Depending on subtle differences in how the stepfather plays his role, attorneys will be more or less willing to accept the joint representation.

Information for Mom

You have two children: one daughter, 14-year-old Dolores and a son, 5-year-old Sonny. You had Dolores when you were 17 years old. Dolores's father was your 18-year-old boyfriend Brad. When he learned you were pregnant he encouraged you to have an abortion and when you wouldn't he broke up with you. You never took any steps to have

his paternity declared. With your parents' help, you raised Dolores on your own. You went to college to obtain a nursing degree.

When Dolores was 5 years old, you met and married your husband. He works at the same hospital you do, as a respiratory therapist. He loves Dolores and she calls him Daddy. While she knows he is not her biological father, he is truly the only father she has ever known. Your marriage is strong.

In the meantime, Brad's life went on without you. Dolores had some brief contact with him before you were married, but he hasn't contacted her since then. A month ago, you learned from Brad's mother that he had died of cancer. She told you that he had set up a $50,000 college fund for Dolores and left it to her in his will. You were strangely sad and even a little angry at the news. You had long ago written Brad out of your life and part of you wished he had either stayed out or stayed in, but this news of a substantial college fund for Dolores was a real shock. Dolores hasn't really known how to handle the news and has been withdrawn and sulky ever since then. At first she didn't even want the money, but you convinced her that it would be foolish to refuse such a substantial college support.

Last week your husband said he would like to adopt Dolores. You think this is a wonderful idea. It would make your family complete and you feel like it would help Dolores to put the recent events in their proper place if your husband became her legal father. You have spoken to Dolores about the idea. She isn't sure how she feels but will do whatever you tell her you think is best for her.

Sonny is too young to have any opinion or even any notion of what this is all about so you aren't worried about him.

Information for Dad

You met your wife when you were both in college. She was studying to be a nurse and you were finishing up your studies as a respiratory therapist. At the time, she had a 4-year-old daughter Dolores. Dolores's father Brad never had much of anything to do with her, which was fine with you because the couple of times you had met him, he was arrogant and rude and treated you very badly. You weren't really keen on the idea of having a family right away but you were so smitten with your wife that you tried your best to be a good stepfather to Dolores.

You didn't really try to step in and become her father. You remember how you felt when you were a child and your parents divorced and your mother remarried. Your stepfather insisted you call him Dad and pushed your real father out so much that you were never really able to maintain a relationship with him. You have always resented your stepfather that presumptuousness and swore you wouldn't do the same thing.

But the situation with Dolores was different. Your wife encouraged her to look to you as her real father and you truly liked the child, so the relationship just sort of grew. You married when Dolores was 5 and when she was 9 you had your own son Sonny, who is now 5 years old himself and your pride and joy.

A month ago, your wife learned from Dolores's biological grandmother (Brad's mother) that Brad had died of cancer. He had apparently done pretty well in the years since he left Dolores and had left $50,000 to Dolores in his will. Your reaction was that it was strange but it was at least the responsible thing to do and it certainly solved a huge problem for you. Your wife had been encouraging you to set up a college fund for Dolores but you had never really done that because she wasn't your daughter and you thought you should first make sure that your biological son's college fund was taken care of. It's not that you mind supporting Dolores—you love her and want her to be taken care of, but the college part just seemed different to you for some reason.

Your wife reacted to the news very strangely. It was like she had just discovered she was a widow. And Dolores was equally hard to read in terms of her reaction. You feel like Brad's death has driven a wedge in your relationship with your wife. She's been very distant ever since and you feel like your marriage is in trouble.

Last week, you suggested that you adopt Dolores. Your wife was thrilled and you felt like this was something she had wanted all along and had never told you. You don't really know what it means in any legal sense but you don't see that it will make a whole lot of difference to you—you're already raising Dolores and know that she will always be close to you regardless of what happens.

7. Reflective Practice

(Reflective Practice Problem, page 413; outcome 18-c)

This problem reviews some of the issues that were discussed in the *Mendoza Toro v. Gil* case in Section 16.4 *supra.*

8. Closure

(Test Your Understanding Problem, Pages 418-19)

I assign this problem for students as a practice exam question and indicate that they should include one client letter or agreement that supports your analysis of one problem. Thanks to my co-teacher Marcia Narine for the Pandora problems.

In question one, students would need to recognize that, since there is no continuation agreement, the partnership assets are likely going to be liquidated to pay the debts of the partnership, and the remainder of the partnership assets will be distributed to the partners based

on their ownership shares and any additional contributions made by either partner. I would expect them to see that conflicts are likely to arise in at least two areas: (1) Whether certain assets are considered property of the partnership subject to division; and (2) What percentage share of the company each partner owns and what individual contributions of each partner are to be paid back. I would also expect students to recognize that they already have a duty of confidentially to Pandora, which prohibits them from disclosing to Denny that Pandora is going to take her share of the partnership assets and open a competing restaurant so that a waiver of confidentiality from Pandora would be necessary before one could even ask for a waiver of conflict. Finally, I would expect them to note the possible conflict because of the prior friendship with Pandora. Savvy business-oriented students might flag the risks of other conflicts (e.g., a major disagreement about partnership shares or contributions that arises during the dissolution) and indicate a need to find out additional facts before agreeing to representation, such as whether either of the partners believes he or she has loaned the business money.

Question Two is a rather straightforward business formation question. I have used this particular problem as a separate one for students to respond to. Here is the rubric I have used to grade that problem.

1. The student identified the relevant issues raised by the problem and within the scope of the question asked.

1	2	3	4	5
The student missed several important issues and communication of other issues was confused, vague or irrelevant to the question.	The student missed at least one important issue and communication of other issues was confused, vague or irrelevant to the question.	The student identified all major issues though the communication of some was vague or irrelevant to the question.	The student communicated all relevant issues, although with some lack of clarity or appropriate weight and did not include irrelevant issues.	The student communicated all relevant issues precisely, clearly and confidently, with appropriate weight to the significance of the issue, and did not include irrelevant issues.

Notes:

Issues the students must be able to:

- Flag the possible former client conflict of interest issue.
- Identify the formation stage as involving joint representation conflicts.
- Identify the shift in identity of the client once the entity is formed.

- Identify the confidentiality issue raised by joint and entity representation.

2. The student accurately applied the relevant legal principles to the issues presented

1	2	3	4	5
The student's analysis of all issues contained errors in the law or was at such a level of generality that it was unhelpful to understanding how the issues would be resolved.	The student's analysis of several issues contained errors in the law or was at such a level of generality that it was unhelpful to understanding how the issues would be resolved.	The student's analysis was accurate, though somewhat general, insecure, and incomplete	The student's analysis was accurate, precise, confident, and complete as to most issues.	The student's analysis was clear, accurate, precise, confident, and complete as to all issues.

Notes:

Rules students should be able to use:

1.7—students should identify the relevant standards as the "material limitation" standard and the most relevant question of limitation being the differential powers and risks between the two clients. They should demonstrate awareness that conflicts analysis is not a one-time decision but must be monitored throughout the representation. They should also demonstrate awareness that conflicts analysis is not resolved solely through client consent, but that unreasonable conflicts are non-waivable and that waivers must be based on an informed consent model of client counseling.

1.13—students should recognize that once the entity is formed, the individuals are no longer clients and the attorney's direction would come from the decision-making authority created by the entity formation documents.

1.6—students should recognize that privilege is waived among the clients but that a waiver of confidentiality must be obtained to reduce the possibility of future conflict and provide competent representation.

3. The student accurately identified additional facts that needed to be gathered or tasks to be completed in order to resolve the questions asked.

1	2	3	4	5
The student did not identify any additional facts to be gathered or steps to be taken. Some facts may have been assumed for which there was no basis for the assumption.	The student identified some general additional facts to be gathered or steps to be taken but did not explain the significance of these.	The student identified some general additional facts to be gathered or steps to be taken and generally explained why those facts or steps would be important or helpful.	The student identified the most important specific additional facts to be gathered, how to gather those facts, and any other specific steps to be taken. The student explained the significance of most of these.	The student identified all critical, specific additional facts to be gathered, how to gather those facts, and any other specific steps to be taken. The student explained the significance of each of these.

Notes:

Some facts the students should all identify as important to resolving these issues include:

- More detail about the relationship between the clients—how long have they known one another? In what capacity? What do each of the other clients contribute to the business?
- Degree to which the parties have already thought about and agreed to issues of risk, control, and rights.
- Degree to which the parties can operate with equal authority—evidence that there are not gross imbalances in bargaining power.
- What exactly does the business want the attorney to do after formation? Just help with initial tasks or act as ongoing counsel to the business.

Some steps the students should identify include:

- Meeting with each client separately to discuss confidentiality and conflicts.
- Obtaining written consents to joint representation and waiver of confidentiality.
- Payment method—resolution of that issue before proceeding.

Question Three asks students to review the third-party payor situation, the necessity for clarifying the identity of the client, and the considerations of Rule 1.7.

Chapter Nineteen: The Current Client and a Former Client

Outcomes, Assessments, and Assignments

Outcome 19-a: Reading and Analyzing Lawyer Regulation

Students should be able to determine whether a proposed representation is the same or substantially related to a matter for which they have provided a prior representation to a client adverse to the current client.

Assignment:

Sections 19.1 through 19.3, pages 421-443.

Assessment:

More so even that being able to define the "same or substantially related matter" test, it is important that students understand the nature of the test. As in any other rule or statutory based course, students are given to expect a degree of predictability and certainty in the law that simply may not exist. I need to continually disabuse students of the notion that one can learn former client conflicts by simply memorizing a list of types of cases that are the same or substantially related, but instead must master a highly fact sensitive inquiry in which context and relationships are critical variables. Thus, I have found the best way to assess student understanding is to ask them to generate the list of facts that they would be looking for in order to screen for a former client conflict. This is an area in which having students bring in and present examples can also be very effective in reinforcing the message that this is an area in which predictability is difficult.

Outcome 19-b: Practice Management

Students should be able to recognize the limits of waiver and withdrawal as tools to eliminate conflicts.

Assignment:

Section 19.3 pages 443-44.

Assessment:

The Maggie Morrison problem and the variation on that hypothetical posed on page 444 can be used to explore student understanding of the limits of client consent.

Outcome 19-c: Reading and Analyzing Lawyer Regulation

Students should able to describe how and why conflicts rules differ when the former client is a government.

Assignment:

Section 19.4, pages 444-448.

Assessment:

Student knowledge of the rule is easily assessed; their appreciation for its importance and the difficulty of enforcement is less easily taught or learned.

Outcome 19-d: Communication Skills

Students should be able to appreciate the importance of clarifying when a representation has ended and be able to draft closing letters that provide that clarity.

Assignment:

Problem 19-A, page 428.

Assessment:

The disengagement letter should clearly disclaim any further responsibility, indicate what is being done with client files (and if retained, the significance of that), and invite further representation in a way that does not undercut the primary message of disengagement.

Outcome 19-e: Formation of Professional Identity

Students should be able to assess whether a career path involving representation of a governmental entity is one that would suit their own strengths and goals.

Interview and Reflection Assignment:

Problem 19-B, page 447.

Assessment:

See the guidelines and instructions I use in Outcome 2-c *supra.* I ask students to not only interview a governmental attorney but to reflect on whether this is a type of practice they would find fulfilling.

Outcome 19-f: Researching Issues in Professional Responsibility ⓘ

Students should be able to describe and use a system of analyzing a professional responsibility problem for research.

Research Assignment:

Research Problem pages 442-43.

Assessment:

The key to assessment here is to force the students to consider the process they would use for research before they begin to research the question. For your own guidance, you might begin with Jon Bauer, *Buying Witness Silence: Evidence-Suppressing Settlements and Lawyers' Ethics,* 87 ORE. L. REV. 481 (2008).

Suggested Classroom Learning Activities

1. Set Up: Worksheet

In preparation for this class, and to reinforce students' use of the rules, I ask students to simply ground themselves in Rule 1.9 and the essential vocabulary of former client conflicts with the following worksheet (with italicized answers removed). I actually require students to use our state's rules of professional conduct for this question, but the answers provided below are from the Model Rules.

FORMER CLIENT CONFLICT ESSENTIALS WORKSHEET

1. Compare Rule 1.7 and Rule 1.9(a) conflicts of interest by completing the following chart

	Rule 1.7	Rule 1.9(a)
Whose interests can create the conflict?	*Any person*	*Former clients*
How must the interest of the conflicting party affect the current client's interests?	*They are directly adverse or significant risk that of materially limiting the representation*	*Materially adverse*

What relationship between the two representations is necessary?	*None. These conflicts can arise in totally unrelated matters*	*Same or substantially related matter*
Is consent possible?	*Yes, so long as it is reasonable, the parties aren't suing one another, it's legal and informed consent is confirmed in writing*	*Yes, if informed and confirmed in writing (and reasonable and legal)*

2. Use the rules of professional conduct, find definitions for the following terms:

"knowingly"	*[Rule 1.0 terminology]*
"firm"	*[Rule 1.0 terminology]*
"same or substantially related"	*[Rule 1.9, cmt. 3 and Rule 1.11, cmt. 10]*
"matter"	*[Rule 1.11(e)]*
"materially adverse"	*[Students should see that, while 1.7 defines "directly adverse" and "material limitation" the phrase "materially adverse" is not specifically defined but is likely to be an amalgam of the two phrases.]*

2. Making Clients "Former"

(Section 19.1-.2 pages 423-427 and Disengagement Letter Problem 19-A page 428; Outcomes 19-a and 19-d)

1. Compare the *Revise Clothing* case (p. 426) with *Gerffert Co.* (p. 427) and develop a list of three concrete steps you can take in any representation to insure that you have ended a representation so that Rule 1.9 rather than Rule 1.7 applies.

Some answers students might provide include:

- Make sure the initial retainer letter defines the scope of representation clearly
- If the scope expands, draft a new engagement letter
- Send a disengagement letter

- If you send any correspondence or communicate after the representation is over, be sure that you don't imply that you still represent the client
- Don't expect that it will be easy to disengage from a long-term client for whom you have represented them in a broad spectrum of matters unless you clearly and absolutely cut off the relationship.

The disengagement letter problem on page 428 is especially challenging in the area of estate planning because often attorneys in these practices do feel an obligation to keep their "former" clients informed and motivated to seek further services. The ACTEC Commentary to Rule 1.9 highlights this by noting:

> The execution of estate planning documents and implementation of the client's estate plan may, or may not, terminate the lawyer's representation of the client with respect to estate planning matters. In such a case, unless otherwise indicated by the lawyer or client, the client typically remains an estate planning client of the lawyer, albeit the representation is dormant or inactive. However, following implementation of the client's estate plan, the lawyer or the client may terminate the representation by giving appropriate notice, one to the other.

AMERICAN COLLEGE OF TRUSTS AND ESTATE COUNSEL, COMMENTARIES ON THE MODEL RULES OF PROFESSIONAL CONDUCT 123 (4th Ed. 2006).

Numerous state bar associations have sample forms that include a sample disengagement letter. As an alternative to having students actually draft the letter, you could assign students to find different forms to compare and discuss their usefulness in this setting.

3. Problem Discussion

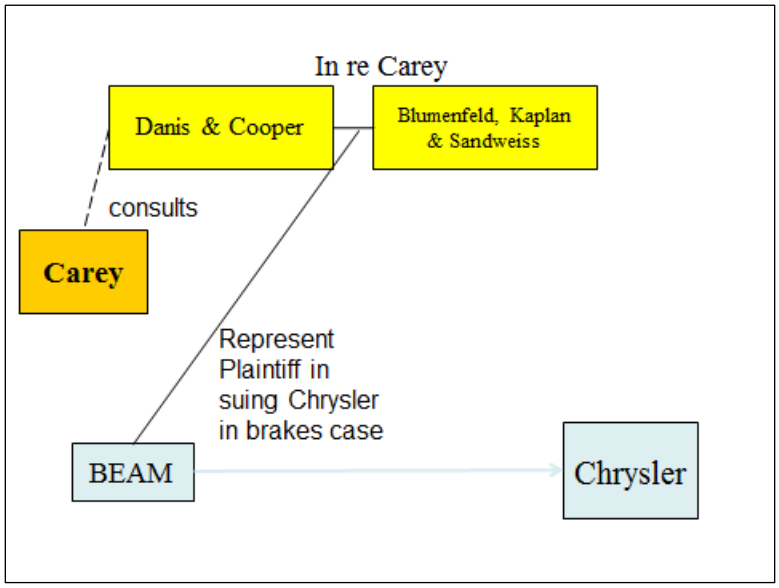
(Preliminary Problem, pages 421-423; Outcome 19-a)

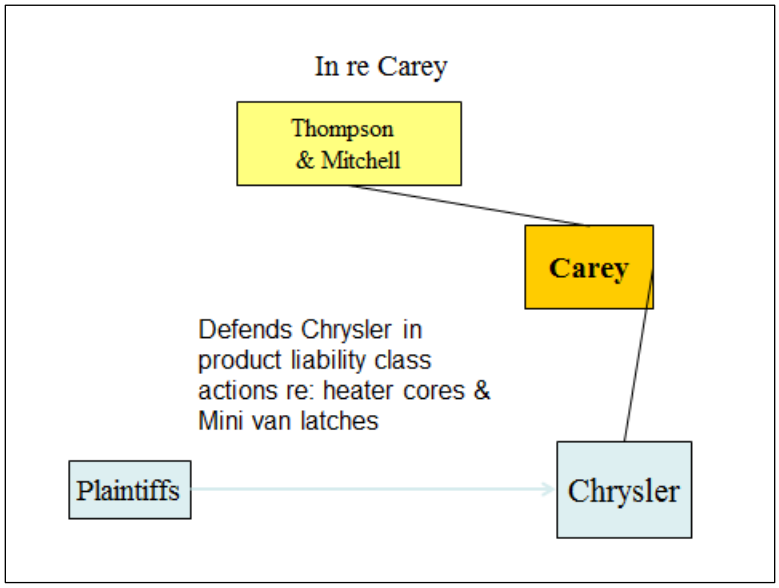
The preliminary problem is basically the *Carey* case in a different context. Students should recognize that the factual connection between the "apology index" and the confidential information overheard in the ethics consultation makes this a situation in which 1.9(c) could apply, even if one concluded that the matters are not the same or substantially related. The basic problem is the "playbook" insights an attorney may have regarding a former client. The term was coined by Charles W. Wolfram in his classic article, still worth reading: *Former-Client Conflicts*, 10 GEO. J. LEGAL ETHICS 677 (1997). Call student attention to the fine line that comment 3 to Rule 1.9 draws on this issue. Most students will conclude that Maggie has confidential information beyond mere "playbook" insights; however students should be cautioned that the matter is one that would require research into the particular jurisdiction's approach to these questions. As William Freivogel commented in 2010 on this issue, "There is no discernible trend." William Freivogel, *A Short History of Conflicts of Interest. the Future?* 20:2 PROF. LAW. 3, 6 (2010).

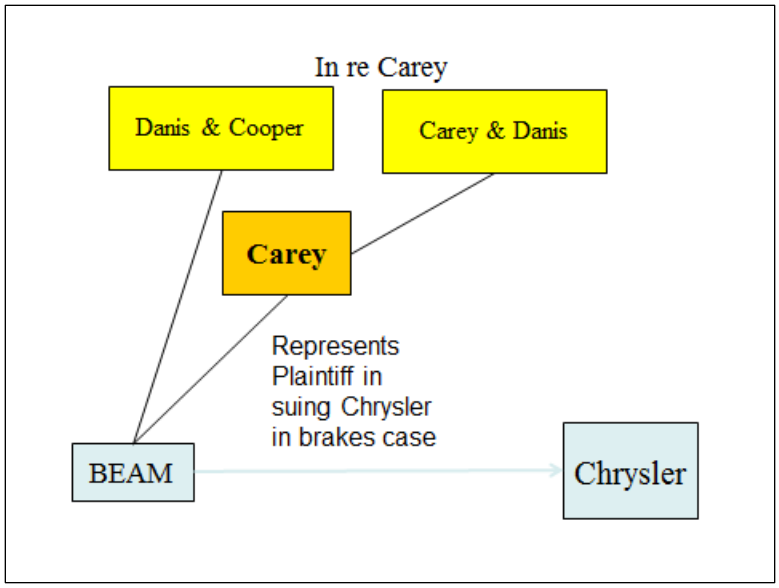
4. Case Discussion: In re Carey

(Section 19.2, pages 428-442)

I begin by diagramming the case:







Q. What facts were especially important to the finding of a conflict?

A. Some facts students should highlight include:

- A large number of hours were billed on the Chrysler cases.
- The cases lasted over three years.
- Carey's primary role was factual development: Carey worked on fact investigation with in house counsel at Chysler and Danis worked on discovery responses.
- Carey drafted the litigation plan/matrix/decision tree strategy that would be used in multiple lawsuits (versus the way an attorney might plan a defense strategy for a client who would not necessarily expect to be sued on related matters in the future).
- Both were members of a team that shared widely distributed information on all aspects of the cases.
- Procedural issues play a central role in defending class actions (regardless of the type of product).
- Minivans were central to both sets of cases.

Other facts simply look suspicious in the overall picture:

- Carey and Danis originally didn't formally enter the case but only provided consultation so their participation wouldn't be as obvious.
- Blumenfeld withdrew when the conflict issue arose.
- The attorneys withdrew from the Beam case but then continued to be involved in the other litigation.
- The attorneys' engaged in misconduct in discovery.

Q. The court applies three values in deciding this case: confidentiality, loyalty, and the appearance of impropriety. How does this analysis compare to the values Rule 1.9 of the Model Rules appears to be based upon?
A. Rule 1.9 focuses only on confidentiality.

5. Polling
(Section 19.2, pages 438-41)

Polling can be used effectively in discussing this case. One question to poll the students on is their opinion of the various tests for former client conflicts (question 3, page 441). I poll the class on their opinion of whether the rules should have kept an "appearance of impropriety" standard for conflicts. Remind students that Canon 2 of the Model Code of Judicial Conduct continues to apply this standard ("[a] judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities.") I then point out that the margin comment on page 438, and ask them to consider whether the similar standard that was Canon 9 of the Model Code of Professional Responsibility for lawyers should have been kept ("A lawyer should avoid even the appearance of professional impropriety").

The primary tension students will likely identify will go to risk analysis:

On the one hand, the vagueness of the provisions "creates the risk that a charge using only such language would fail to give fair warning of the nature of the charges to a lawyer respondent and that subjective and idiosyncratic considerations could influence a hearing panel or reviewing court in resolving a charge based only on it." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYER § 5(c) (2000). The breadth would be over-inclusive: disqualifying or disciplining attorneys when there has not been, in fact, any harm to the attorney-client relationship or the integrity of the system. This breadth also unduly limits attorney mobility and client choice.

On the other hand, some students might argue that the public perception of lawyers is an independent value worth protecting and that a broad standard of conflicts such as this can help. They might, as some courts have stressed, suggest that this is the standard that clients might reasonably expect of their attorneys. They might also note that the rules provide broad—even vague—protection in other places ("good moral character" requirements for admission; "prejudicial to the administration of justice" definition of misconduct in Rule 8.4(d)) without significant evidence of misuse of this breadth. *See generally*, Edward C. Brewer, III, *Some Thoughts on the Process of Making Ethics Rules, Including How to Make the "Appearance of Impropriety" Disappear*, 39 IDAHO L. REV. 321 (2003) .

This is also a good discussion to direct students' attention to the different standards that might apply in disqualification motions rather than in disciplinary actions. Several jurisdictions that have disciplinary rules based on the ABA Model Rules of Professional Conduct nonetheless

have recent judicial decisions that directly or indirectly apply the "appearance of impropriety" standard as a basis for disqualification.

Finally, this discussion can emphasize the point made in the text regarding the impact of cultural norms on how attorney's think about conflicts (text pages 352). Even if the appearance of impropriety isn't a rule, should it be an aspirational standard?

For further discussion of the standard in terms of judicial conduct, Professor Rotunda's lecture, captured in his article, *Judicial Ethics, The Appearance of Impropriety, and the Proposed New ABA Code,* 34 HOFSTRA L. REV. 1337 (2006), argues against the use of this standard in judicial ethics as well.

A second useful poll, which can highlight the critical role that the attorneys' failure to cooperate in the disciplinary action played in this case, is ask the class what they think is the biggest mistake attorneys make in how they react when they get an ethics complaint. I have also asked this as a minute paper. You might find interesting the responses my students gave to this prompt and the percentage of the class providing the response.

21 Lie
22 Ignore it
24 Attack /contact the complainant or the process
9 Quibble over whether it is a violation
9 Make excuses
2 Think only how it is affecting you
4 Fail to take responsibility for your actions
2 Try to cover it up
2 React automatically instead of taking time to investigate, refresh recollection, find documentation, and get advice.
1 Do whatever it is again
1 Immediately get defensive
1 Answer questions without getting legal advice
1 Admit anything
1 Withhold information that you know others know

Obviously, the last three students were well-steeped in criminal defense practice! Their responses in particular provided an excellent opportunity to discuss the differences between a criminal proceeding and a disciplinary proceeding.

6. Researching Conflicts

(Research Problem, pages 442-443, Outcome 19-f)

Using the research problem in class is a good way to reinforce that a necessary part of good research is understanding what you are researching and why. The particular problem used

there, secrecy agreements in settlements, not only reinforces the idea that a conflict might arise not only between two clients but between the attorney and the client. If you assign this problem, I would suggest devoting a small portion of class time during which you play the role of the attorney providing this research assignment and answer questions 4-10 in such a way that students will be given relatively confined search parameters. You can have the students create a research plan only, or you could have them actually follow through on their plan. I have found that asking students to trade plans and use the guidance each has provided to actually research the question is an excellent method of providing peer assessment of research methods.

7. Consents and Waivers

(Section 19.3, pages 443-44, Outcome 19-b

The question in the text regarding whether Maggie Morrison (preliminary problem, page 421-11) could, upon leaving her hospital employment, secure an advanced waiver of conflict from the hospital can make for an interesting discussion. To emphasize the "reasonable attorney" perspective, ask students to think of the problem from the point of view of the in-house counsel at the hospital. What benefit would it provide to the hospital to provide such advanced consent? What terms might they insist upon? A role play of the negotiation of this waiver would be most entertaining as well as informative!

Follow up this with a discussion of what happens when, at a later date when the new firm is suing the hospital, the hospital decides to withdraw its consent. I find the District of Columbia Bar Ethics Opinion on this issue especially useful in guiding this discussion. Alternately, this would make a fine research assignment. http://www.dcbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion317.cfm.

8. Government Attorneys

(Section 19.4 pages 444-47, Outcomes 19-c)

Briefly reviewing the chart on page 447 is generally sufficient to ground students in this rule. I use the problem that follows this material to apply these and other conflict standards.

In terms of the blanks in the chart, both Rule 1.10(a)(2) and Rule 1.11 permit screening to prevent imputation of conflicts and require notice to the former client. Rule 1.10 only allows screening when the former client conflict arises because a disqualified attorney is moving from one private firm to another. The screening rule is more specific about the nature of the notice required to the former client than is the requirement in Rule 1.11.

The only definition of "matter" is to be found in Rule 1.11(e).

An attorney can use (as opposed to disclose) a former private client's information in representing a new client whenever that information either would not harm the former client or is

generally known. Rule 1.9(c)(1). Similar standards apply to former government attorney's use of confidential government information (Rule 1.11(c)).

Students are often curious about the provisions of Rule 1.11 concerning negotiating for private employment while in government service, as they are often anticipating clerkships upon graduation. This aspect of the rule is discussed in section 23.3, pages 541-43. If you do not plan to cover this chapter, you may wish to assign this section as part of the subject matter of these conflicts classes.

9. Closure: Test Your Understanding Problem
(Problem, pages 444-48, Outcomes 19-a and 19-c)

The final problem helps students work through Rule 1.11 and also reinforces the message that government lawyers nearly always have specialized rules that apply by virtue of their government service. A guide to the questions in that problem follows:

1. Rule 1.11 only refers to former government attorneys and so is not helpful in addressing this question. A basic Rule 1.7 analysis isn't especially helpful either, since the interests of the victim and the public appear closely aligned. However, students should recognize that "moonlighting" in this way is likely to be prohibited by the terms of the attorney's employment. As the notes following Rule 1.11 point out, there are a host of these regulations for government employees. In particular, government ethics regulations at 5 C.F.R. §§ 2635.801-808 restrict the outside activities of federal government attorneys. Students may be surprised to learn that some of these restrictions carry criminal penalties. For example, 18 U.S.C. § 203 provides that government employees are prohibited from being compensated for "representational services" in connection with a particular matter in which the United States is a party or has a direct and substantial interest. 18 U.S.C. § 205.

2. Quitting then engages the Rule 1.11 analysis, which would prohibit this representation because it is the same matter and the attorney participated personally and substantially. Again, the available waiver would be unlikely here. Federal law reinforces this prohibition. A former employee is prohibited from representing someone else before the government on a particular matter involving specific parties in which he participated personally and substantially while working for the government and in which the United States is a party or has a substantial interest. 18 U.S.C. § 207(a)(1).

3. While the rule provides for screening, with notice to the Department of Justice, it is nearly impossible to screen in a two-person office and gain any of the advantages of a partnership.

4. This asks students to compare the analysis under Rule 1.7 to Rule 1.11 and requires some client identity analysis. Because of this, it can serve as an excellent review problem. The students

should see that Rule 1.7 permits many more representations than does Rule 1.11. Students would have to consider whether the litigation aims and rights of the employees and the shareholders would be in conflict with one another when they are all bringing suits against the officers and directors. Obviously, the employee couldn't be suing the corporation itself, as this would be directly adverse to the client in the derivative action (the corporation, as represented through the shareholders).

Chapter Twenty: Imputation and Migratory Attorneys

Outcomes, Assessments, and Assignments

This is a very short chapter, so I combine it with the Unit Review. However, the materials in this chapter can be very challenging to students simply because it is difficult for them to imagine the type of caseload they might have and the conflicts challenges it might present.

Outcome 20-a: Reading and Analyzing Lawyer Regulation

Students should be able to identify which of the conflicts that are imputed to an attorney while in a firm the attorney takes with her when she moves to a new firm; identify which of an attorney's own conflicts continue to be imputed to that attorney's firm after she has left the firm; and identify the types of conflicts for which screening the disqualified attorney will prevent the imputation of that attorney's conflicts

Assignment:

Chapter 20.

Assessment:

This is a simple rules recognition outcome. Being able to recognize the standards is fairly straightforward. Apply the standards is much more difficult to assess well, as it generally requires a fairly detailed set of facts.

Outcome 20-b: Practice Management

Students should be able to describe the elements of an effective ethical screen.

Assignment:

Section 20.2 and Problem 20-A (page 453).

Assessment:

Students should be able to identify the communication, document, and technological restrictions necessary to create an effective screen.

Suggested Classroom Learning Activities

1. Set Up: Guest Lecture

(Chapter 20, Outcome 20-b)

This is an effective class to bring in a panel of attorneys to describe the systems they use to identify and resolve conflicts when firms merge or new attorneys join the firm.

2. Problem Discussion

(Preliminary Problem, page 449; Outcome 20-a)

I elaborate on this problem with some additional facts. First I ask students, "How could Ashley properly let her new firm know whom she had represented and what kinds of cases were involved at the former firm without violating confidentiality?" and point them to the discussion on page 454 regarding Rule 1.6 exceptions. I also remind them that many states do not consider the mere fact that an attorney represents a particular individual as confidential information.

I then give the students the following additional facts:

ABC had three cases in which they defended BBI in employment discrimination matters:

Case #1

3 years ago

BBI and several people in human relations regarding a personality test they were using as part of their hiring practices in management positions that was alleged to have disparate impact on women. BBI lost the case.

This was Ashley's first "rotation"—she provided some document review in the discovery phase of the litigation and attended a summary judgment motion hearing.

Case #2

18 months ago

BBI and Marvin Manager sued to require that they provide reasonable accommodations for an employee Alfred Alman, who working in the sales department. The firm won a summary judgment in favor of BBI.

Ashley researched and wrote a memo about a purely evidentiary issue (admissibility of videotape expert testimony) in the case. She received very little information about the case.

Case #3

2 months before she left

BBI and Ollie Overseer in a sexual harassment claim by Veronica Victim, who worked in one of BBI's processing facilities. BBI settled and the claim was dismissed early on.

Ashley had no involvement in the case but had heard about some of the claims being made by Veronica when talking with other Associates at a firm happy hour

PQR's case

Francis Former against BBI and Marvin Manager in the sales department, claiming age discrimination because she was denied a promotion.

Assume Ashley does not work on the Francis Former case at all after joining PQR. If BBI brings a motion to disqualify PQR based on the fact that Ashley had joined the firm, how would PQR defend?

Francis Former is materially adverse? Yes

Are the matters the same or substantially related?

No—The age discrimination matter in promotion is not the same or substantially related to the representations of BBI. The practice was a promotion not hiring (as in Case #1) conditions of employment (Case #2 or 3) and it was in sales, not management (as in case #1) or processing (Case #3). While it's the same manager and department as Case #2, accommodations is much different than age discrimination. ADA cases don't require so much proof of discriminatory intent or comparators, it's simply about the accommodation.

Yes—the combination of all three cases gives Ashley greater insight into BBI's overall practices regarding discrimination, and especially Marvin Manager's practices and beliefs.

If yes, did Ashley acquire protected information? Certainly yes in the first case but in the case that is the closest (Case #2) she might try to prove she was peripherally involved.

3. Proving and Defending Disqualification Motion

Whether students are practicing in a jurisdiction that applies rebuttable presumptions or one that simply applies the language of the Model Rule and looks for proof of actual information access, the key problem in defending against disqualification is proving that a negative: that is, that the attorney did not gain confidences or secrets about a former client. I point out comment [6] to Model Rule 1.9, which suggests that when evaluating whether a lawyer has actual knowledge of a party's confidences from a prior affiliation, the court should make a decision

based on each situation's particular facts, "aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together." The key question, according to the comment, is whether lawyers in the particular firm normally had wide access to information about other lawyers' cases.

I then ask students how they would prove that they did not have this access. This would, of course, depend on where files were maintained and whether the lawyers in the firm regularly discussed their cases with each other. Students should recognize that, to mount a successful attack on the presumption, the lawyer should garner evidence--such as time records and affidavits--substantiating that he spent little or no time on the former client's matter and learned nothing of significance about the client's case, that he did not discuss or have access to confidential materials, and that confidential information about the objecting client's matter would not normally have been imparted to him. Conversely, a bare denial of any knowledge of relevant confidential information is not likely to suffice, especially when the lawyer played a demonstrable role in the representation

4. Comparing and Constructing Ethical Conflict Screens

The following chart can be distributed and discussed or given to the students in blank form to complete for class.

	Consent required?	Prerequisites to the screen	Elements of screen	Notice required	Details of notice required	Follow-up required
Rule 1.18(c)	Both clients give informed consent confirmed in writing	Reasonable measure to avoid disqualifying information	Timely screened (Rule 1.0(k)) + No fee	Written notice promptly given to former (i.e., prospective) client	None	None
Rule 1.11(b)	No consent required	Knowingly representing client in the "matter"	Same	Same	to ascertain compliance	None
Rule 1.10(a)(2)	No consent (but note must	Arises out of disqualified lawyer's association	Same	Same (details provided)	to ascertain compliance + 4 elements: describe,	Certification of compliance by

	respond to objections)	with a prior firm			affirm, appeal, respond	screened lawyer and partner when asked and at end

In completing the problem 20-A on page 453, I look for the following elements of a good screen.

1. Separation of people

Not only should the disqualified attorney have no involvement in the law firm's representation of its client, the attorney's associates and support staff who are under the attorney's regular supervision should not be working on the conflicted matter.

2. Separation of space

The disqualified lawyer's office or work station and that of his or her secretary should be located away from the offices or work stations of lawyers and support staff working on the matter. Discussions of the conflicted matter should take place only in private areas.

3. Separation of files

The files of the conflicted matter should be segregated, labeled, and accessible only to those attorneys and staff working on the matter.

4. Separation of technology

The above restriction applies to computer files as well, which should be on servers or directories that are inaccessible to the disqualified attorney with a separate password system.

5. Separation of conversations

The disqualified lawyer should not discuss with anyone else in the law firm either the conflicted matter or the representation of the former client and no lawyer in the firm should discuss these matters with or in the presence of the disqualified lawyer. E-mail systems should be put in place to insure segregation of the disqualified attorney. Discussions regarding the conflicted matter should only occur among those working on the matter. Disqualified attorney should not be included in any practice group meetings, partner meetings, or similar meetings at which the conflicted matter might be discussed.

6. Separation of fees

The billing system should provide a method for segregating the fees from the conflicted representation so that the disqualified attorney will have no direct financial benefit.

7. Written policy and enforcement measures

The screening policy should be written, communicated both in writing and orally to all lawyers and support staff in the firm. The policy should include the sanctions that will be imposed for violations of the policy. The disqualified attorney and the attorneys working on the conflicted matter should sign affidavits of compliance. Regular reminders should be provided, especially whenever new personnel join the firm.

8. Notice to the former client

The former client (or his or her attorney, if represented in the matter) should be advised that the disqualified attorney is in the firm representing the conflicted client, the measures the firm has taken to protect confidential information, and a mechanism for the former client to receive additional information regarding compliance.

9. Ongoing monitoring and documentation

One person should have the responsibility for auditing the screen and providing regular reminders. This person should maintain records relating to the screen, which should be kept for the malpractice statute of limitations period.

10. Closing the screen

The effectiveness of screens diminishes when they are allowed to linger past the time when they are no longer needed. The segregations should be discontinued and notice that the screen has closed should be sent to all relevant persons in the firm.

5. Closure—Minute Paper

Since this is the last chapter in the unit on conflicts, I usually ask students what is the one specific question or issue about conflicts of interest that they are still confused about. I then either report back at the beginning of the next class or prepare a memo addressing the questions.

Unit Five Review

Along with the report-back on the minute paper at the end of the last class, I also ask students to review the chart and complete the multiple choice questions in the unit review on pages 456-59 to see if they have any other questions.

The motion to disqualify problem on pages 460-62 can be used as a role play demonstrating cross examination in a disqualification motion or it can be used as a basic discussion review problem. The case upon which the problem is based is cited on page 462 and provides a thorough analysis of the issues.

Unit Six Preview

The questions in this unit preview are not meant to solicit knowledge of the rules but opinions about the ethical viewpoints of the students in approaching litigation. I find these are best used in threaded discussion lists so students can read and react to each other's views.

Chapter Twenty-One: Ethics in Litigation Practice

Outcomes, Assessments, and Assignments

Outcome 21-a: Reading and Analyzing Lawyer Regulation

Students should be able to identify limits on methods of obtaining evidence or using evidence others have obtained; identify standards limiting an attorney's use of trial publicity and constitutional standards that apply to that regulation; describe the differences in role and responsibility when representing a client in mediation.

Assignment:

Chapter 21

Research/Worksheet:

The notes following Rule 3.4 (Visualize) on page 470 provide an example of an annotation of the first subsection of Rule 3.4. For class, annotate the remainder of the rule, providing references to the laws outside the rules that would be important or necessary to understanding the rule. You may need to do some preliminary research to identify some areas of law.

Assessment:

The preliminary problem reviews most of these issues and the general guidelines for answering the questions are provided at the end of the chapter for students' self-assessment.

The answer key for the annotation exercise is described in Classroom Activity #2 below.

Outcome 21-b: Communication Skills

Students should be able to strategize appropriate responses to attorneys who engage in abusive tactics.

Assignment:

Section 21.5, pages 494-96.

Assessment:

The knowledge of how to respond to unethical attorneys can be easily assessed through discussion, but having students role play how to respond can often be much more effective in

helping to translate these ideas into practice. The role play problem at page 487 can be useful in demonstrating some of these conversations.

Outcome 21-c: Researching Issues in Professional Responsibility ⓘ

Students should be able to locate local rules and practice regarding deposition practice.

Assignment:

Research Problem pages 493-94.

Assessment:

If you have students interview attorneys for this assignment, use the guidelines and rubric in described in Outcome 2-c supra.

Outcome 21-d: Formation of Professional Identity 🚹 🚺

Students should be able to identify their own attitudes toward conflict and how those attitudes might impact their ability to represent clients effectively and ethically.

Assignment:

Reflection Problem pages 470-71.

Assessment:

See appendix on using reflective learning exercises for general guidance on assessing reflective essays.

Suggested Classroom Learning Activities

1. Set Up: Movie Time and Zealous Representation

Hollywood is full of creative investigations and dramatic courtroom scenes that are violations of the rules discussed in this chapter but so many are so clearly over the top that they demean the seriousness of the very real problems in litigation practice. Scenes of depositions or trials in A Civil Action are realistic and effective in raising some of these issues. (I recommend Kelly Lynn Anders' book ADVOCACY TO ZEALOUSNESS: LEARNING LAWYERING SKILLS FROM CLASSIC FILMS (Carolina Academic Press 2011) for other ideas for movies to depict lawyering

skills. Playing a scene or two from a trial or deposition can set up some of the questions about student views of what is proper and what is unethical. The classic "Anatomy of a Murder" scene can make for outstanding discussion of the line between witness coaching and suborning perjury. See Michael Asimow, *Anatomy of a Murder—The Lecture* (1998) at http://usf.usfca.edu/pj//articles/anatomy.htm.

An alternative way to set up this class is to simply as "What does it mean to be a zealous advocate?" I sometimes begin with a quick quiz question to frame this discussion.

Canon 7 of the Code of Professional Responsibility requires that "a lawyer should represent a client zealously within the bounds of the law." Which of the following statements best reflects the comparison of this provision to the Model Rules of Professional Conduct?

A. The Model Rules do not contain any statements regarding zealous advocacy.
B. The Model Rules have rejected a standard of zealousness as poorly representing the proper role of an advocate and officer of the court.
C. While there is no equivalent to this canon in the text of the rules, the comments have parallel concepts.
D. The text of Rule 3.2 requires diligent and zealous representation.

2. Annotating Rules

(Section 21.1, pages 466-470; Outcome 21-a)

Review the students' annotations and remind them that they have already studied many of these laws. Section (1) of the rule has been annotated on page, 470. Some of the basic law the students should identify for the remaining sections of the rule include:

(2) Perjury (see discussion at activity #3, Chapter 12); Suborning perjury (18 U.S.C. §1622); Bribery (Section 240.1 Model Penal Code; Various state statutes).

(3) Contempt (See discussion of *State v. Gonzales*, Chapter 11 *supra*).

(4) Rules 26(g)(3) and Rule 37 of the Federal Rules of Civil Procedure

(5) Amendment I, U.S. Constitution; Mistrial

(6) Witness tampering (18 U.S.C. § 1512)

(7) Extortion

3. Gathering and Preserving Evidence

(Section 21.2, pages 471-477; Outcome 21-a)

This section is a very dense narrative of the limits on fact investigation. I use problem discussions to help students apply this material. If time is short, I may use short hypotheticals; if I have more time, I use the role playing exercises provided below.

Short problems

Paula Planner is an estate planning attorney. Her client Fanny Frail has revealed to her that doctors have indicated that she will be unlikely to live for another six months. Fanny appears to be in good health at the present, but second and third opinions on the nature of her illness make it clear that the doctor's prognosis is very likely. Fanny is extremely wealthy and would like to avoid estate taxes. Paula has advised Fanny that gifts made in contemplation of death are taxed under higher estate tax rates, but gifts without an expectation of death are not. Paula has advised Fanny that she make the largest possible gifts she can to her children and that she write letters to go with the gifts of plans to visit, to attend graduations, or other plans for four or five years into the future. Paula also advises Fanny to book a cruise for three years from now. "With evidence like this, no one will question that you expected to live for many years." Is Paula subject to sanction?

Students should recognize that the attorney's advice violates the rules regarding constructive false evidence and 8.4 standards regarding honesty. Some students will push back because this is a tax planning hypothetical, arguing that the client may really be hoping to live that long, providing an opportunity to reinforce the temptation to rationalize behavior that one knows violates the rules and is dishonest. Other students will take a pragmatic approach, indicating that the medical evidence would disprove this chicanery so it is not only unethical but ineffective.

Role Playing Exercise

You can have students complete this exercise out of class or can demonstrate the role play during class.

Memorandum
TO: Lawyers

FROM: Senior Partner

RE: Patricia Smith

Our client Patricia Smith is seeking a divorce from her husband Sam. They don't have any children and it looks like a pretty simple divorce—married when they were just out of high school and have grown in separate directions. I'd like you to take over the case. I've met with Patricia briefly and prepared the petition and statement of income and

expenses and assets and debts (attached), but Patty called today and wants to talk with someone about the information she provided.

IN THE CIRCUIT COURT OF MIDDLE COUNTY, ANYSTATE
AT CENTER CITY

IN RE THE MARRIAGE OF:

Patricia Smith
5235 Holmes Street
Center City, Anystate
SSN: XXX-XX-0001
Petitioner **Case No.**
AND **Division:**

SAMUEL SMITH
5235 Holmes Street
Center City, Anystate
SSN: XXX-XX-0002
Respondent.

PETITION FOR DISSOLUTION OF MARRIAGE

COMES NOW, Patricia Smith, Petitioner, by and through undersigned counsel, and in support of her Petition for Dissolution of Marriage, states and avers as follows:

1. Petitioner is now and was continuously for a period of time in excess of ninety (90) days preceding the commencement of this action a resident of Anystate. Petitioner is a resident of Middle County, residing at 5235 Holmes Street, Center City, Anystate.
2. Petitioner's Social Security Number is XXX-XX-0001. She is currently employed by Center City Junior College, 80984 University Avenue, Center City, Anystate.
3. Respondent is now, and was continuously for a period of time in excess of ninety (90) days preceding the commencement of this action a resident of Anystate. Respondent is a resident of Middle County, residing at 5235 Holmes Street, Center City, Anystate.
4. Respondent's Social Security Number is XXX-XX-0002. He is currently employed by Center City Academy, 20988 Shady Tree Lane, Center City, Anystate.
5. Petitioner and Respondent were lawfully married on January 1, 1998[48]. Said marriage is registered in Middle County, Anystate.

[48] Correct date to 15 years earlier

6. Petitioner and Respondent separated on or about April 18, 2014.[49]
7. There were no children born of the marriage of the parties.
8. Petitioner is not now pregnant.
9. Neither Petitioner nor Respondent is a member of the Armed Forces of the United States or any of its allies on active duty.
10. Petitioner and Respondent are both able bodied and employed at a substantial wage. Neither party requires support from the other.
11. Petitioner and Respondent are both possessed of sufficient means to bear their respective costs of this action, including their attorney's fees.
12. Petitioner and Respondent have accumulated property during the course of the marriage, as well as certain obligations; and Petitioner requests that the Court make a finding that any Marital Settlement Agreement entered by and between the parties is not unconscionable; or, in the alternative, if the parties have not executed a Marital Settlement Agreement, that the marital property and marital debts be divided in a fair and equitable manner.
13. Each party owns certain non-marital assets.
14. Irreconcilable differences have led to an irretrievable breakdown of the marriage. There is no reasonable likelihood that the marriage of Petitioner and Respondent can be preserved. Therefore, the marriage is irretrievably broken.

WHEREFORE, for the foregoing considerations, Petitioner prays for the entry of a Judgment Decree that: a) dissolves the marriage of Petitioner and Respondent; b) awards no maintenance to either party; c) determines that any Settlement Agreement entered by and between the parties is not unconscionable, or, in the alternative, divides the marital property and debts in a fair and equitable manner; d) awards each party their separate property; e) directs that each party pay their own attorney's fees, if any; e) assesses court costs of this proceeding to Petitioner; and f) awards Petitioner any such other relief as the Court may deem just and proper.

Respectfully submitted,

_____

Attorney, #0000
Address
Phone: (816) 000-0000
Fax: (816) 000-0000
Email: aaaaa@aaaaa.com
ATTORNEY FOR PETITIONER

[49] Update to more recent date

VERIFICATION

STATE OF _____
COUNTY OF _____

PETITIONER, of lawful age, being first duly sworn, on her oath states:

That she is the Petitioner in the above and foregoing action; that she has read the Petition for Dissolution of Marriage prepared by her attorneys on her behalf. Having read the statements, allegations and averments contained therein, Petitioner knows the contents of said document(s), and after reasonable inquiry states that the facts contained therein are true and correct to the best of her knowledge and belief.

_____
PETITIONER

Subscribed and sworn to before me this _____ day of _____, 2011.

_____
Notary Public
My commission expires:

IN THE CIRCUIT COURT OF MIDDLE COUNTY, ANYSTATE
AT CENTER CITY

IN RE THE MARRIAGE OF:

Patricia Smith
5235 Holmes Street
Center City, Anystate
SSN: XXX-XX-0001
Petitioner **Case No.**
AND **Division:**

SAMUEL SMITH
5235 Holmes Street
Center City, Anystate
SSN: XXX-XX-0002
Respondent.

INCOME AND EXPENSE STATEMENT OF PETITIONER

A. GROSS WAGES PER PAY PERIOD $ 705.20

PAID : Weekly _X_Bi-Weekly ___ Semi-monthly___ Monthly _____
B. My **MONTHLY** Gross Wages or Salary: $ 2,820.80
C. TAX STATUS: Single ____ Married_X Head/household _____ Number of Dependents Claimed 0
D. PAYROLL DEDUCTIONS EACH PAY PERIOD:
FICA (Social Security Tax) $ 59.64
Federal Withholding Tax $ 28.58
State Withholding Tax $ 29.62
City Earnings Tax $ 0
Union dues $ 0
Health Insurance Premium $ 10.38
Others: $_____
My total deductions each pay period $

E. MY NET TAKE HOME PAY PER PAY PERIOD $ 576.98

F. Additional Income: (List income from second jobs, rentals, dividends, social security, retirement, V.A., business enterprises, TANF, annuities, bonuses and all other sources.)

Source Income
Independent Secretarial Work (occasionally) $ 2,000

My total average monthly additional gross income $166.66

G. The value of fringe benefits paid partially or totally by employer, i.e. health, disability insurance, etc. $_____
H. **MY TOTAL MONTHLY GROSS INCOME (Add Line B, F and G) $** 871.86
II. ANTICIPATED MONTHLY EXPENSES

A. Rent or mortgage payments (include home association dues) $ 659.00

B. Maintenance and repairs of residence $ 20.00

C. Utilities
1. Gas $ 45.00
2. Water $ 15.00
3. Electric $ 105.00
4. Telephone $ 0
5. Mobile/Cell/Pager $ 75.00
6. Trash Service $ 0 TOTAL UTILITIES EXPENSE $ 240.00

D. Automobiles
1. Gas and Oil $ 150.00
2. Maintenance $ 10.00
3. Tax and License $ 5.00
4. Payment of Loan/Lease $228.81
TOTAL AUTOMOBILE EXPENSE $ 393.81

E. Insurance
1. Life $ 0
2. Health $ 0
3. Dental $ 0
4. Vision $ 0
5. Disability $ 0
6. Homeowners/Rental (if not included in mortgage) $ 0
7. Automobile $ 70
TOTAL INSURANCE EXPENSE $ 70

F. Taxes
1. Real Estate (if not included in mortgage payment) $ 0
2. Personal Property $ 20
TOTAL TAX EXPENSE $ 20

G. Regular monthly payments I make on debts, i.e. credit cards, etc. $ 0

H. Child Support paid to other for children not in my custody and not involved in this proceeding $ 0
I. Maintenance or Alimony paid by me to persons other than my current spouse $ 0
J. Work-related Child Care (average school year and summer childcare) $ 0
K. Other Monthly Living Expenses
1. Food $ 300.00
2. Clothing $ 60.00
3. Medical Care $ 5.00
4. Prescription Drugs $ 0
5. Dental Care $ 5.00
6. Vision Care $ 0.00
7. Recreation $ 25.00
8. Barber/Beauty Shop $ 25.00
9. Church/charitable $ 25.00
10. Cable TV/Dish/Internet $ 50.00
11. Toiletries $ 15.00

12. Other Expenses
_____ $_____
TOTAL OTHER EXPENSES $ 510.0
TOTAL AVERAGE MONTHLY EXPENSES $ 929.00

IN THE CIRCUIT COURT OF MIDDLE COUNTY, ANYSTATE
AT CENTER CITY

IN RE THE MARRIAGE OF:

Patricia Smith
5235 Holmes Street
Center City, Anystate
SSN: XXX-XX-0001
Petitioner **Case No.**
AND **Division:**

SAMUEL SMITH
5235 Holmes Street
Center City, Anystate
SSN: XXX-XX-0002
Respondent.

STATEMENT OF MARITAL AND NON-MARITAL ASSETS AND DEBTS

MARITAL AND NON MARITAL PROPERTY

	Fair Market Value	Amount Owed	Equity	Marital or Separate	Poss'n H W
A. Real Estate 5235 Holmes Street, Center City, Anystate Lender: Bank of America	120,000	85,000	35,000	M	H W
B. Motor Vehicles 2007 Honda Accord XXXXS8092083409080	8,626	0	8626	M	W
2010 Dodge Ram 1500 Quad Cab	17,902	10,000	7,902	M	H

XXXXS8769879487548					
C. Bank Accounts Bank of America Joint Checking Account #08909082	2,149			M	WH
Bank ofAmerica Savings Account #08909200	2,846			M	WH
D. Securities AG Edwards Mutual Funds	49,080			M	WH
E. Retirement, Pension and/or Profit Sharing Center City Junior College Pension Plan (not vested)	0			M	W
Center City Academy Pension Plan (100% vested)	16,080			S	H
F. Debts Owed to You	0			M	
G. Cash on Hand	50			M	W
H. Household and Personal Goods Computer, Laptop, Gaming system, Television, Clothing and Sporting Goods	5500	0	1000	M	H
Household Furnishings, Cookware and Appliances, Washer and Dryer, Clothing and Jewelry	7000	0	7000	M	W

DEBTS

Creditor	Current Balance	Secured Y/N	Mnthly Pymnt	Liability incurred by H/W/J	Who should pay
Mortgage on 5235 Holmes Street, Center City, Anystate Bank of America	85,000	Y	659	J	
2010 Dodge Ram 1500 Quad Cab XXXXS8769879487548	10,000	Y	253	H	H

CONFIDENTIAL
Instructions for Client

You are Patricia Smith. Your spouse is Samuel Smith. You have been married for 15 years. You were high school sweethearts and married just after graduation. Upon graduation from high school, your spouse went to college at Center City University and graduated with a teaching degree. He is an assistant principal at a local charter school. You work as an administrative assistant at the local junior college, where you are slowly working your way toward an associates degree.

The statement of income and debts you provided to the attorney were accurate at the time you provided them. Until this past week, you had really thought that your only debts were the mortgage on your house and the loan on the pickup truck. However, your husband, who usually does the taxes, kept putting them off this year. When you told him you wanted a divorce, he took off to spend a few weeks with his brother in another state. So you took it upon yourself to take the taxes to an accountant so they would get done before it was too late. You didn't have a lot of information beyond your husband's W-2s, so your accountant helped you to access your accounts to gather information. One of the things he did was run a credit check in order to get some information on your mortgage and discovered that your husband had amassed a credit card debt of nearly $50,000. You insisted it had to be a mistake, but the more your accountant looked into it, the clearer it became that your spouse has been taking cash advanced on several credit cards over the past two years. You didn't even know he had credit cards. Likewise, you learned that he has taken $20,000 out of your mutual funds.

You have learned that he has been gambling with this money since about three months after he got a job last year as a part-time bartender at a local casino. You should offer the attorneys a flash drive and tell them that "all the proof is there: This should prove that I don't have to be responsible for his gambling debts." You shouldn't tell the attorneys how you got the flash drive unless they ask. If they do, you can tell them that you went into your husband's study, opened up his briefcase, got out his laptop and looked at the information there. It started out as just a search to get the financial information for the taxes (he keeps the checking account on a computer program), but then you went back after you found out about the credit card and searched the whole laptop, including accessing his email accounts and looking at his internet history. You have used his laptop in the past in his presence, but never without his permission. You've never had to enter the password to gain access to the laptop (he's always started it for you if you wanted to use it), but you had no problem guessing the password because it is the same password he uses for the debit card and the house

security alarm, both of which he has shared with you. You copied much of this information on a drive that you offered to the attorneys.

If the attorney tells you that you can't use this information, insist that you have to because your husband will simply delete all this information off his laptop.

Students should recognize the issue of potential violations of the law in accessing the laptop and the data therein and should refuse the flashdrive and counsel the client appropriately regarding not only her own actions but how to protect against her husband's destruction of evidence. When asked how they would follow up on this interview, they should indicate that they would research, consult, and document.

4. Case Discussion: *Mancia v. Mayflower*
(Section 21.3, pages 477-87, Outcome 21-a)

The key issue for students to discuss in this case is why the court's exhortations didn't work (note 1, page 486). Inevitably students will boil this down to "we might lose if we cooperate." I like to refer the students back to page 311 and the empirical studies that indicate that "competitive/problem-solvers" are the most effective in negotiations. To the extent that discovery is nothing more than an elaborately orchestrated negotiation over access to information, this would indicate that the most aggressive and competitive approaches are not necessarily the most successful.

The case also can be used to highlight the tendency to believe that one can "fight fire with fire" when it comes to abusive tactics. Clearly the judge thought that both sides had engaged in some overreaching with their requests and objections.

Note 2 asks whether the discovery battles were "worth it." This makes a good opportunity to discuss the effect of fee shifting statutes on litigation conduct. For an article examining this issue in more detail, consider William H. Wagener, *Modeling the Effect of One-Way Fee Shifting on Discovery Abuse in Private Antitrust Litigation,* 78 N.Y.U. L. REV. 1887 (2003).

I have had some limited success with the role play exercise on page 487. The primary limitation is that the case provides insufficient facts for the students to play out the role fully. The most successful part of the role play, however, and the reason I continue to try to use it, is its effectiveness in helping students to realize the difficulty in explaining discovery cooperation to a client whom one is representing in litigation.

5. Giving the Devil His Due: *In re Anonymous Member of the South Carolina Bar*
(Section 21.4, pages 487-94, Outcomes 21-a and 21-b)

A discussion of how to respond to each of the types of problems mentioned in the text can help students process this court's standards more effectively. I have had students present a very lively debate between the attorneys Lucifer and Gabriel (using old Halloween headwear of horns and halo) over how to handle depositions. I include their "script" here if you would like to use it, either as a staged debate, or to play only the role of the unscrupulous attorney, asking students to respond to the attorney's comments.

If you aren't given to such theatrics, the same material can be covered in a straightforward discussion of each of the problems raised by the readings, the rules applicable to each, the limitations of those rules in deterring conduct, and the steps one can take to deter this misconduct.

L: You really should do whatever you can to gain the upper hand in a deposition: these are the make-or-break part of the case, there's very little oversight so you can get away with a lot, and if you do get challenged, you can always take refuge in the notion of "zealous advocacy."

G. Don't be tempted! How you treat people during depositions is one of the places you really show what kind of lawyer you are!

L. Right—a winner or a loser! One way I use depositions to win is by driving up costs. Here's how to do that: Give very little notice, don't try to coordinate schedules, cancel and reschedule as often as possible or simply don't show up, and be sure to schedule as many depositions as you can handle, whether necessary to your case or not.

G. Now you know that's just not right. It's not fair and it's not how you would want to be treated. Besides, Rule 3.2 requires that attorneys "expedite litigation" and the comment to that rule further emphasizes that delay is not justified for "personal reasons", "for the convenience of the advocates" or "for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose." Likewise Rule 3.4 directs that an attorney may not "make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party."

L. Hah! I say. Who's going to be able to prove a pattern of delay? Who's going to be able to prove my subjective intent? I can justify almost any action and I'll get away with it. Those rules are so full of fudge words like frivolous and reasonable that I can do what I want.

G. A good lawyer (and I mean <u>good</u> in every sense of the word) won't let it get that far. She will document your behavior by providing written objections to your actions. She will report

violations to the bar, with her client's consent. But most importantly, she will use the rules of discovery: particularly discovery conference agreements, discovery orders if necessary, motions to limit or terminate depositions, and sanctions for failure to comply with discovery rules.

L. Fine, but even if I'm forced to be reasonable in scheduling depositions, I'll make sure any deposition you take of my client or witnesses won't get you anywhere. When you prepare your witnesses, you simply discuss the kind of questions that will be asked, encourage your client to answer the questions asked, and give them general reactions to their demeanor without specific directions as to what to say. I, on the other hand, coach the client about what to say, how to say it, what not to say and how not to say it before we ever get to the deposition. What do you think you can do about that?

G. If I can prove it—and don't be so sure that I can't—you could be subject to discipline for violation of Rule 3.4 for falsifying evidence, counseling a witness to testify falsely, or offering an inducement to a witness that is prohibited by law. I could move for sanctions and you might end up facing criminal sanctions for suborning perjury. Besides, don't be so sure my deposition skills are so poor that I won't be able to establish rapport with your client during the deposition and artfully guide your client to giving me the truth.

L. IF you can prove it. IF you can do it. That's fine. Even if I can't get my witness coached well enough ahead of time, I'll be there with such behavior as "off the record conferences" with the deponent, "speaking objections," "brief suggestive interruptions" (e.g., "if you remember," "don't speculate"), and rephrasing for the record my interpretation of the interrogator's question.

G. And I'll make sure that will all be on the record, including my questions about the subject of any off the record conferences. And for all that, you still won't be able to counter my skills in deposition questioning—listening carefully, skillful use of narrow and specific questions, timing of questions—that can still bring out the truth.

L. Hah! Truth! I'll tell you the truth, wing-boy! I know how to dim that halo of yours—I'll have you angry and frustrated and treating my witness badly, so I have an excuse to call off the deposition.

G. (Pause, silence, smile sweetly)

L. (Moving toward Gabriel menacingly) Got nothing to say, Gaabreel?

G. Smile! You're on videotaped deposition dear. Your name calling is unacceptable behavior. I can't imagine why you would want to give me this evidence that would permit me to seek a formal protective order from the court, which could lead to my right to redepose the

witness, limitations on your right to introduce evidence or any of the other sanctions discussed by the court on page 493.

L. Bah!

6. Problem Discussion—Trial Publicity and Attorney Speech
(Section 21.6 pages 496-506; Outcomes 21-a and 21-b)

I begin by reminding the students how the opinions lined up. There were three opinions in this case. Justice Kennedy announced the judgment of the Court, but his opinion was joined only by Marshall, Blackmun, and Stevens. Chief Justice Rehnquist's opinion was joined by Justices White, and Scalia and Souter. Justice O'Connor's opinion joined Justice Kennedy on the issue of the vagueness of the Nevada statute and the Chief Justice's opinion regarding the standard to be applied to attorney speech. The portions of Chief Justice Rehnquist's opinion, which were joined by Justice O'Connor to make a majority opinion, addressed the standard by which attorney speech should be judged.

I ask the students a number of questions designed to connect the rule to the opinion.

Q. Look at the amended Nevada rule on page 504. Part (a) provides the basic standard for restrictions on trial publicity. How does that standard compare to the standard that existed when Gentile was decided?
A. It's basically the same (see page 498, quoting the Nevada Supreme Court's finding).

Q. Justice Rehnquist rejected the argument that the standard for attorney speech should be "clear and present danger" or "actual prejudice or an imminent threat" and found the standard of "substantial likelihood" to be constitutionally sufficient protection. Do you agree? Do you think the standard should be different for prosecutors than it is for defense attorneys?
A. Students reasoning should at a minimum reflect the policies discussed by the court, of the special role—and therefore influence—of attorneys versus the public's interest in trials and the defendant's interest in a fair trial.

Q. How did the ABA respond to the Court's concern regarding the vagueness of the standards? Do you think the revised standards provide clear guidance to attorneys?
A. Students should recognize that the revised standards removed "the general nature of the defense without elaboration" but it still permits "the claim, offense or defense involved" and should be able to formulate opinions on whether that improves the clarity of the rule.

To engage in a broader discussion of free speech rights of attorneys, you may wish to circle back to the *Milavetz* opinion, which cited *Gentile* as establishing a standard for regulation of attorney speech.

I use the following problem (with facts taken nearly verbatim from *Matter of Westfall*, 808 S.W.2d 829, 831-32 (Mo. 1991)) to wrap up the section:

Paul Proudman was a prosecuting attorney and was involved in a series of prosecutions of Dennis Defendant for crimes committed in connection with the death of Defendant's wife, Victoria. Proudman first led the prosecution of Defendant for murder in the first degree. Defendant was acquitted of that charge and found guilty of involuntary manslaughter. He was subsequently indicted on charges of armed criminal action and destroying physical evidence. The trial court denied Defendant's motion to dismiss the indictment on grounds of prosecutorial vindictiveness and double jeopardy. Defendant then filed petition for a writ of prohibition in the State Court of Appeals, seeking to bar further prosecution of these charges. The court of appeals issued a preliminary rule in prohibition and subsequently made the writ absolute.

The court of appeals' opinion in the matter, the unanimous opinion of a three-judge panel of the court, was authored by the Honorable Gerald Judger. The court held first that the question of prosecutorial vindictiveness involved disputed facts, a matter to be considered on direct appeal if required. Relying on *Missouri v. Hunter,* 459 U.S. 359, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983), the court also held that a subsequent trial of Defendant for armed criminal action would constitute a violation of Defendant's protection under the Double Jeopardy Clause of the Fifth Amendment of the Constitution of the United States. *Missouri v. Hunter* held that where the legislature specifically authorizes cumulative punishment under two statutes, regardless of whether these two statutes proscribe the "same" conduct, it does not violate double jeopardy to impose cumulative punishment under such statutes in a single trial. *Id.,* 103 S.Ct. at 679.

On the day the opinion was issued, Proudman gave an interview to a television reporter which was broadcast on the local Fox News affiliate station's 6:00 p.m. and 10:00 p.m. news programs. Some of the statements Proudman made in that interview, which were broadcast, included:

... The Supreme Court of the land has said twice that our armed criminal statute is constitutional and that it does not constitute Double Jeopardy.

....

... but for reasons that I find somewhat illogical, and I think even a little bit less than honest, Judge Judger has said today that we cannot pursue armed criminal action. He has really distorted the statute and I think convoluted logic to arrive at a decision that he personally likes.

....

The decision today will have a negative impact on all murder one cases pending in our state and some that are already on appeal with inmates in prison. So it's a real distressing opinion from that point of view.

....

But if it's murder first degree and we're asking for death, which, of course, is the most serious of all crimes, Judge Judger's decision today says we cannot pursue both. And that, to me, really means that he made up his mind before he wrote the decision, and just reached the conclusion that he wanted to reach

Proudman was referred to disciplinary counsel for violation of Rule 8.2. Proudman responded with the defense that Rule 8.2 violates his first amendment rights. How successful do you think he will be in that defense?

In the *Westfall* decision, on which this problem is based, the attorney was subject to discipline and the court rejected his first amendment claim; however, the decision was subject to considerable criticism. As the Colorado court later noted, "commentators have found *Westfall* "very troubling indeed," saying that discipline there was improper because the statements at issue were not "factual statements about the judge that could be proved to be true or false." GEOFFREY C. HAZARD, JR. AND W. WILLIAM HODES, 2 THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT § 8.2:201 at 935 (2d. ed. Supp.1997)." *In re Green*, 11 P.3d 1078, 1086 (Colo. 2000).

Perhaps the most interesting part of the discussion of this problem involves the students' responses when asked why the prosecutor thought this was a good idea.

7. Helping Clients Cooperate

(Section 21.7, pages 506-10; Outcome 21-a)

A good way to close out the chapter is to ask students to demonstrate how they would counsel a client regarding cooperation requirements and strategies in litigation. Have students work in pairs to practice their counseling and then ask students to report on especially effective techniques they heard from their partners. You can use this discussion to then review the materials on preparing clients for mediation, where the attorney must not only orient clients toward the idea of cooperation, but prepare the client to communicate directly on their own behalf.

Chapter Twenty-Two: Communicating with Litigants, Witnesses and Jurors

Outcomes, Assessments, and Assignments

Outcome 22-a: Reading and Analyzing Lawyer Regulation

Students should be able to identify and apply the standards regarding communication with represented persons and appropriate use of exceptions to these standards and identify limitations on contact with witnesses and jurors.

Assignment:

Chapter 22, Sections 22.1 and 22.3.

Assessment:

A policy debate question can help to identify student misunderstandings regarding the tensions in the rules.

Outcome 22-b: Communication Skills

Students should be able to identify risks resented by dealing with a pro se litigant and steps they can take to reduce that risk.

Assignment:

Section 22.2.

Assessment:

Asking students to simply list problems/solutions will assess understanding of this outcome at a basic level, but role playing a situation such as that discussed at the bottom of page 524 will provide the best opportunity for students to assess their ability to put that understanding into practice.

Outcome 22-c: Researching Issues in Professional Responsibility

Students should be able to locate and analyze their own jurisdiction's laws on contact with third persons.

Assignment:

Research Assignment page 523.

Assessment:

If your state is one in which the rule has changed in recent years, you can alter this assignment slightly to ask students to research the state of the law at an earlier time. Students rarely have the opportunity to practice locating earlier versions of state supreme court rules, so that this exercise reinforces the importance of understanding the time parameters of research.

Suggested Classroom Learning Activities

1. Policies

(Chapter 22; Outcome 22-a)

These rules are deceptively difficult. Both Rules 4.2 and 4.3 are difficult doctrinally because the definition of a "represented person" is vague and shifting, particularly in the context of entity representation. Students find it difficult to remember that Rule 4.2 cannot be waived by the individual client. Rule 4.3 is difficult to put into practice. Finally, Rule 3.5 is a rule so governed by local practice and procedure, and so defers to unfamiliar legal territory.

To begin, then, I find it useful to simply ask students to justify each of these rules from a policy perspective, identifying the tensions in those policies.

2. Diagramming the Rule

(Section 22.1, pages 511-514; Outcome 22-a)

To begin discussion, I ask the students to imagine that they are writing a FAQ for attorneys on the rule. I provide a breakdown of the elements of the rule and ask student to come up with what they think would be the most common questions of interpretation for each part of Rule 4.2.

- An attorney shall not

  Students should recognize the interaction of Rule 8.4 and this rule raises the question of whether, if an attorney's client contacts a represented party, the attorney has violated the rules "through the acts of another." (Discussed on page 514, bottom paragraph.)

- Communicate

  Does this include asking questions? Sending a letter? Reading a letter? (Cf. page 513, first paragraph.)

- With a person

When an entity is represented, when are you speaking to the entity? Which persons represent the entity for purposes of this rule? (*Palmer v. Pioneer Inn,* pages 516-23)

- Known to be represented

  How do you know if someone is represented? Do you have a duty to inquire? (See comments in first paragraph, page 513.)

- About the subject matter

  Does this rule only apply to litigation? How broad does "subject matter" reach? (See discussion of second opinions on page 515)

- Unless permission

  Can the represented person waive this rule? (See "reasons" discussion on page 513). What kinds of laws give permission? (See "relationships" discussion on page 512)

3. The "Represented Person" Discussion

(Section 22.1, pages 514-23; Problem page 528; Outcomes 22-a)

The *Palmer* case, being a certified question to the Supreme Court of Nevada, provides a scholarly discussion of the rule and its purposes. I first review the policies and the relationship between this rule and other rules.

Q. The court begins with an exhaustive list of policies in tension in the rule (page 517, middle of the page). As the margin comment suggests, many of these policies are furthered by other rules. Give some examples of a policy that is protected by other rules:

A. Protecting against inadvertent disclosures of privileged information (Rules 1.6, 4.4, and the law of privilege); Permitting more equitable and affordable access to information (Rules of discovery); Protecting against overreaching (Rules 4.1, 4.4)

Q. The court examines the relationship between Rule 4.2 and Rule 11 of the rules of civil procedure and the attorney-client evidentiary privilege. Why are these sets of law important to consider in choosing the test to be applied under 4.2?

A. Rule 11 requires pre-filing investigation—too broad a prohibition places attorneys in a position in which it may be difficult to fulfill this requirement. (However, the opinion does not consider that the attorney could request the court to approve pre-filing contact in order to further the purposes of the rules). Since an important purpose of Rule 4.2 is protecting privileged information, drawing lines around employees whose conversations with attorneys would be privileged makes sense.

Q. Comment 7 to Model Rule 4.2 defines the represented persons in an entity as constituents who supervise, direct, or regularly consult with the organization's lawyer concerning the matter, who have authority to bind the organization in the matter, or whose acts or omissions in the matter may be imputed to the organization for liability purposes. How does this differ from the managing agent test in the Nevada court's opinion?

A. The Nevada court's opinion uses only the "authority to bind the organization in the matter" part of the test.

I use the Problem for Practice on page 528 to review the application of the Nevada test.

Dave Wagner, the boss at St. Lukes, is not "represented in the matter" because St. Lukes isn't a party. He is simply a witness and could be interviewed under any version of the 4.2 test.

Suzanne Finnegan, isn't a current employee, and so is, again, not a represented party. Even if she is an employee, she wasn't involved in the hiring decision and has no authority to bind the entity, so in all tests except the most inclusive tests, the attorney could interview her.

Elenora Taylor, is without question a former employee. So long as the attorney doesn't inquire into privileged conversations, she is merely a witness and can be interviewed.

Jennifer Walker is unlikely to have authority to bind the entity, so in all tests except the most inclusive tests, the attorney could interview her.

George Apustolu is the difficult individual. The problem is based loosely on the facts in *Palmer v. Pioneer Inn Associates, Ltd.*, 338 F.3d 981 (9th Cir. 2003), where the court held that the trial court erred in excluding the testimony of the chef (whose name was Kapetanakis). Here is the excerpt from the court's opinion on this question:

> Pioneer has not alleged sufficient facts to show that Kapetanakis had speaking authority for Pioneer such that his statements would bind the organization in the context of this case. As the district court concluded, "there is no indication, either explicit or implicit, that Pioneer had authorized Kapetanakis to make statements concerning the hiring of individuals by other Pioneer employees," and "there is no allegation that Kapetanakis played any part in the employment decision affecting Plaintiff." *Palmer I,* 19 F.Supp.2d at 1165-66. These conclusions flow from the undisputed testimony of Kapetanakis. As a chef, Kapetanakis interviewed and hired cooks, dishwashers, and sous chefs for Pioneer's restaurants; those responsibilities were completely unrelated to the decision whether or not to hire Palmer. Kapetanakis testified during his deposition that he was not responsible for interviewing or hiring waitresses. Moreover, Kapetanakis came to play a part in this drama only by a fluke-a conversation with a mutual acquaintance that occurred many months after the incident. Kapetanakis's testimony stemmed from his role as a percipient witness, not from any privileged attorney-client communication, a distinction emphasized

> by the Nevada Supreme Court. *Palmer II,* 59 P.3d at 1248. The managing-speaking agent rule is not intended to shield Pioneer from the effects of the "prejudicial facts" in Kapetanakis's possession. *See id.* at 1245.

Palmer v. Pioneer Inn Associates, Ltd., 338 F.3d 981, 988 (9th Cir. 2003)

One additional problem that is an interesting question for the students is whether an attorney could speak with in-house counsel of an entity when the entity is being represented by outside counsel on a matter. Suppose Allen Abodago in the problem is a private attorney, hired solely for the purposes of defending the resort in this case. Suppose the resort has an in-house counsel (Irene Inhouse). Could the attorney interview the Inhouse counsel without Abodago's permission? In an Formal Opinion on the subject, the ABA opined that a lawyer representing a client in a matter involving an organization generally may contact the entity's in-house counsel without seeking permission from its outside attorney in the matter.

> We conclude that an inside lawyer, unless that lawyer is in fact a party in the matter and represented by the same counsel as the organization, is not a part of the 'represented person' within the meaning of Rule 4.2.… The protections provided by Rule 4.2 are not needed when the constituent of an organization is a lawyer employee of that organization who is acting as a lawyer for that organization…. When communications are lawyer-to-lawyer, it is not likely that the inside counsel would inadvertently make harmful disclosures.

ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-443 (Aug. 5, 2006). The opinion noted that the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYER § 100, cmt. c (2000) takes this same position.

4. Communicating with the Unrepresented Person

(Section 22.2, pages 523-28; Outcomes 22-a and 22-b)

I focus on unrepresented opponents in this discussion since these are the most difficult cases. I begin by connecting the discussion to some of the materials from preliminary chapters (or forecasting Chapter 24) by asking students to consider some broader policy questions about pro se litigation.

- Why do so many people represent themselves, even when they can afford attorneys?
- What does this say about our marketing and delivery of legal services?
- Why does the law encourage self representation in some situations (protective orders, tax preparation, etc.)? Are there other areas of law that should be made more accessible for self-help?

Q. What are the risks when dealing with self-represented parties?

- Rule 4.3 identifies one of those risks—misleading a pro se client
- Short of the attorney who deliberately misleads a pro se client about the attorney's role, why might misunderstandings be a risk?
    - Clients don't understand.
    - Attorneys forget that clients don't understand.

A brief role play regarding how you would speak with an unrepresented person is helpful here. For example, suppose you are in-house counsel for St. Mercy Hospitals. The auditor from the compliance department in the hospital reported that a recent routine audit identified trends of overbilling that are consistent and frequent enough to cause concern that there may be a pattern of fraud. You reviewed the audit and agreed that there may be cause for concern and decided to conduct an internal investigation.

How will you explain your role to the individuals with whom you will be speaking?

5. Research Reports
(Problem page 523, Outcome 22-c)

If you assign a research task, such as that on page 523, ask students to report on their research.

In addition, or as an alternative research assignment (especially if you will not be otherwise assigning research into local court rules), ask students to research their jurisdiction's rules on contact with jurors. About one-third of the federal district courts have local rules concerning pre-trial communication with prospective jurors and over half have a local rule that greatly restricts an attorney's ability to communicate with jurors after a trial and judgment. The United States Court website provides an index to U.S. District Court websites http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

6. Closure: Test Your Understanding
(Problem page 530; Outcome 22-a)

In the case on which this problem is based, the attorney was sanctioned for improper contact with a represented party and the court granted the motion to strike the declarations. This problem makes a nice closing reminder of the risks of ignoring Rule 4.2 requirements.

Chapter Twenty-Three: Judges and the Adversary System

Outcomes, Assessments, and Assignments

Outcome 23-a: Reading and Analyzing Lawyer Regulation

Students should be able to compare the core duties of judges and the core duties of attorneys and identify the reasons why attorneys must understand judicial ethics.

Assignment:

Chapter 23, especially Sections 23.1 and 23.4.

Assessment:

The primary doctrinal understanding students must have is that they have a duty to know enough about judicial conduct codes to avoid assisting a judge in violating those codes.

Outcome 23-b: Reading and Analyzing Lawyer Regulation

Students should be able to apply rules governing ex parte communication with judges to a variety of situations.

Assignment:

Section 23.2.

Assessment:

A brief quiz will assess student understanding of these limits.

Outcome 23-c: Communication Skills

Students should be able to describe methods of protecting clients when dealing with judges who violate their duties

Assignment:

Section 23.4.

Assessment:

Ask students should be able to produce a list of "tips" for dealing with unethical judges or propose hypotheticals and ask for student responses.

Suggested Classroom Learning Activities

1. Respected judges

Ask the students to think about a judge (local or national, current or historical) whom they admire and to write down three qualities that make that judge great. Interestingly, students will often come up with adjectives such a smart, courageous, no-nonsense, respectful, great writer, etc. that bear little resemblance to the ethical duties outlined in Section 23.1 of the text. One of the points this little exercise can help to reinforce is that great lawyers and great judges share many of the same characteristics. Wrap up the discussion by reinforcing that the main difference between attorneys and judges—neutrality vs. partisan advocacy—and asking students to reflect further on what exactly it means to be "neutral" or "impartial."

2. Ex parte communication

The excerpt from *In Re Wilder* lays out the basics of the ex parte contact rule that provided a basis for sanctions. Additional facts from the rest of that opinion and from the opinion disciplining the judge fill out the picture of what actually happened in this case. First, the discipline question involved two separate matters. The first, which is not reprinted in the text, was a conflict of interest in which Wilder represented an unmarried couple in their partnership and, when they couple split up, he then represented one against the other without consent and used confidential information against his former client. The picture thus painted is of an attorney who is either ignorant of the rules of professional conduct or who ignores them.

Second, the judicial discipline case provides details that make Wilder's action appear even more calculated and improper than the bare facts provided in the attorney discipline opinion. The case involved a controversial political issue involving the appointment and then removal of a commissioner to a board that would determine uses to be made of a federal excess property known as the Indiana Army Ammunition Plant. The decision to file a TRO had been made by the city of Utica the day before attorney Wilder filed the petition. Among the additional facts that are not recited in the attorney discipline case but are cited in the judicial case are:

- The attorney and judge were close personal friends. The judge's bailiff was the attorney's father and the judge had lived with the Wilder family at one point.
- Wilder and Moore had been in the same courtroom on a case about an hour before Wilder filed the TRO but Wilder didn't mention the TRO to Moore.
- Moore testified that he had not been delivered notice at all.
- Wilder was joined in his meeting with the judge by Utica Town Board President Glen Murphy.
- The day before the TRO, the judge had lunch with his bailiff, Harry Wilder (the attorney's father) and with Glen Murphy. A witness has stated she was seated two tables

away and overheard them discussing a "lawsuit." (The judge said it was a federal lawsuit they were discussing).
- The courthouse closes at 4:30. Wilder filed the petition for the TRO at 4:28.

Before I share these additional facts, I ask students what might have been in the mind of the attorney in this case. Students generally suggest that the attorney didn't know the rule or had rationalized a reading of the statute that made him think he had not violated the rule. The first reason can provide an opportunity to once again reinforce the lesson that ignorance of the law is no excuse and that the knowledge element of the rule is simply knowledge that you are communicating ex parte. The second reason can lead to a discussion of the importance of considering whether one's conduct violates the purposes of the law, even if one can come up with a plausible reading of the rule.

I then ask students to review some common ex parte communications and consider whether these would ordinarily be prohibited by the rule:
- Judge calls and asks attorney to provide draft findings or an order. (Illinois Opinion 94-7 (9/94) says this is prohibited).
- Attorney calls with a request to extend time to respond.
- Attorney calls to see if a decision is pending or has been made.
- Attorney sends judge before home the attorney regularly appears a "friend" request on social media. (ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 13-462 (Feb. 21, 2013) approves with some limits.)

For a thorough discussion of these and other problems, you may refer students to the article Jack M. Weiss, *It Depends on the Meaning of "Ex Parte,* 29:2 LITIGATION 2 (2003). That article emphasizes that it is critical to understand local practice and local rules, since judges vary widely in their interpretation of the rule. What the *Wilder* case demonstrates is that, even if a judge seems to think a particular form of ex parte communication is proper, an attorney has an independent responsibility to determine whether the judge's interpretation is correct.

3. Judicial Clerks

(Section 23.3, pages 541-43; Outcome 23-a)

I include this section in the text because so often students have judicial internships while they are in law school or are hoping for clerkship after graduation. I invite students who are or who plan to be clerks to send me questions to address during class on the issues raised in this section. I try to avoid open-floor discussions or questions because I have once too often had students ask questions that themselves violate the confidentiality of chambers or ask me to give my opinion of particular judge's practice (and thus test my ability to comply with Rule 8.2!).

4. Dealing with Unethical Judges

(Preliminary Problem, page 533; Section 23.4, pages 543-46; Outcome 23-a and c)

The preliminary problem poses the practical difficulties in fulfilling the attorney's obligation to report judicial misconduct. The attorney in these situations is in a terrible position, particularly if he or she regularly represents clients before the judge. I ask students to brainstorm how one could effectively report judicial misconduct that occurs in the secrecy of chambers (or, in this case, a closed juvenile courtroom) in such a way that it will harm the ability to represent clients before that judge should no action be taken against the judge.

Similarly the restaurant conversation, which is based on some of the background facts in the *Wilder* case, presents a difficult choice as to respond. When I ask students whether the attorney is required to report the judge, they often will respond that the attorney shouldn't report until he or she has better "evidence." I challenge this perception with the definition of knowledge ("can be inferred from the circumstances") and with the comment to Rule 8.3: "The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware."

The scenarios in Section 23.3 serve two purposes. First, they provide a basis for students to brainstorm responses to unethical judges. Second, to the extent students in your classes are preparing for the MPRE, I have selected sections of the Model Code of Judicial Conduct that are likely candidates for questions on that exam.

In the first problem, the first question I ask students is whether the attorney has violated prohibitions on ex parte contact by asking the judge's clerk about when an opinion would be forthcoming. Students will argue that this is simply "administrative" matter, and in many courts, it might be considered that; however, students should be cautioned that many courts would consider this a violation. Some delays are the result of overburdened courts rather than judicial procrastination, in which case there is very little to be done. If a judge has a regular pattern of inexcusable delay, some responses might be to request a hearing, report to the administrative or chief judges in the district or circuit, or file a writ of mandamus.

The second problem involving bias from the bench has, as a practical matter, been most effectively dealt with when media attention is focused on a judge. Ask students how an attorney might ethically involve public attention on a judge without violating Rules 8.2 or 3.6.

The third problem will engage students in some debate over whether the requested loan is even a violation of the rules. The point to be emphasized of course is that the risk to both attorney and judge with these loans make quibbling over the lines in the rules foolish and the attorney would be better off helping to problem solve the judge's financial circumstances without making a personal loan.

5. Closure: A View from the Bench

A short visit from highly respected judges in your community can be very effective in providing overview of the topics in this chapter.

Unit Six Review

Since many of the issues raised in this unit raise issues from prior units (especially Unit Four on confidentiality and candor), you may wish to use this unit review as an overall review of course topics.

Review Problem

The review problem raises a number of issues regarding dealing with evidence and witnesses and reinforces messages of knowing who the client is and dealing with unrepresented persons. One of the most important messages this problem raises is the reminder that much of a lawyer's behavior in investigations and counseling of clients is increasingly regulated by law other than disciplinary codes.

The investigation of Anonymous raises the issue of whether the threats to get back the information and to keep Anonymous quiet would violate his legal rights. Efforts to restrict dissemination of this information could easily come back to haunt the client in the form of a retaliation claim or simply as evidence of the credibility of the ex-employee's claims in the eyes of the other employees, the federal investigators, the court, or the media following the dispute. Students should indicate that they would want to research federal and state statutes, especially the Fair Labor Standards Act, 29 U.S.C. s215(a)(3) (1988), to determine whether these threats would constitute unlawful retaliation. *See generally*, *Kasten v. Saint-Gobain Performance Plastics Corp.,* 131 S. Ct. 1325, 179 L. Ed. 2d 379 (2011)(oral complaints are protected against retaliation under Fair Labor Standards Act).

Likely the attorney would be safe on insisting that the employee return of any documents that are proprietary business information. *See, e.g., NLRB v. Brookshire Grocery Co.*, 919 F.2d 359 (5th Cir. 1990) (an employee who was discharged for taking confidential salary information out of his supervisor's files contended that his discharge violated the National Labor Relations Act; Fifth Circuit held that the employee was properly discharged, not for his discussion of wages, but for "surreptitiously obtaining the confidential salary and raise information from respondent's files"). Taking the additional step of insisting Anonymous keep quiet, however, may cross the line. If this threat were made after an investigation was underway by the government, this conduct might even constitute obstruction of justice. At a minimum the attorney should be concerned that he may have violated Rule 3.4(f).

The discussion with Barak looks like a request to engage in insider trading and the attorney should be very concerned about even the limited statement regarding the effect of the dispute on stock prices. Moreover, while the attorney can represent both entity persons and the entity, he can do so only if there is not a conflict of interest. Rule 1.13(f). We don't know the extent to which the CFO would have any personal liability for violation of FLSA violations. At a

minimum, however, the attorney should have clarified his role, since the CFO appears to think the attorney is providing personal advice.

The discussion with Mitt raises similar questions. Under Rule 3.4(f) the request that Mitt keep the rumor confidential would be permitted because Mitt is an employee unless it is in Mitt's interests to share the information (e.g., if Mitt is part of the class of employees who have been victims of wage and hour violations). Giving Mitt advice about the immigration matters is purely personal legal advice and is permitted under Rule 1.13(g), though one might question whether the attorney is competent in providing this advice.

In response to the opposing attorney's motion and order, the students should recognize that cooperation with the opposing counsel would permit the attorney to avoid the TRO, as the opposing attorney might drop that motion if the attorney appears cooperative. However, the attorney also should be aware of the costs of discovery the attorney's search protocol might impose and prepare to meet that request with an appropriately negotiated discovery plan (if possible) or a court order to limit and guide discovery (if not).

Unit Seven Preview

As noted in the introduction to the unit, many of the topics covered in this unit connect with the broader topics of professionalism and regulation of legal services addressed in Unit One. Some faculty members might wish to assign these chapters along with Unit One chapters in order to emphasize the topics raised here.

Page references for answers to the pre-test

1. pages 558-59.
2. page 568.
3. pages 581-83.
4. pages 595-96.
5. page 596.
6. page 601.
7. page 604.

Chapter Twenty-Four: Making Law Affordable and Accessible

Outcomes, Assessments, and Assignments

Outcome 24-a: Reading and Analyzing Lawyer Regulation

Students should be able to describe and critique the constitutional right to legal representation and the system of legal services representation in the United States. They should be able to describe the ways in which the structure and regulation of the legal profession influences the accessibility of legal services, including the relationship between the professional monopoly and the attorney's duty to provide pro bono and appointed representation; the ways in which standards of competence and diligence become modified in order to encourage attorneys to increase access to representation; and the ways in which conflict of interest standards become modified in order to encourage attorneys to increase access to representation.

Assignment:

Chapter 24.

Assessment:

One of the most helpful assessments of student understanding of the materials in this chapter is to ask how some of the basic rules the students have studied (e.g., competency, communication, confidentiality, candor, or conflicts) affect the price and availability of legal services.

Outcome 24-b: Practice Management

Define unbundled or limited scope representation and describe the risks and benefits of providing this type of representation.

Assignment:

Section 24.4.

Assessment:

Problems for Review on page 580 provide effective assessment of student understanding.

Outcome 24-c: Communication Skills

Students should be able to explain an attorney's obligation to accept court-appointed representation and the bases upon which an attorney may properly avoid such an appointment and prepare and defend a motion to withdraw in these types of cases.

Assignment:

Section 24.3

Assessment:

I use the Practice Problem 24-A on pages 570-72 to provide a basis for studentst o self-assess their skills.

Outcome 24-d: Formation of Professional Identity

Students should be able to define the role they will play in insuring access to justice in their professional life.

Assignment:

I provide a reflective prompt for students in which I ask them to describe their plan for how they will fulfill the oath of admission they will be taking.

Assessment:

See appendix for assessing reflection.

Outcome 24-e: Researching Issues in Professional Responsibility

Students should be able to locate and analyze local court rules that provide for appointment of attorneys.

Assignment:

Research Exercise 24-A, page 569.

Assessment:

As with any research exercise, be sure to ask students to describe the process they used to locate the authority they have provided.

Suggested Classroom Learning Activities

1. Guest Lecture:

This is an excellent class to bring in private attorneys who have done important pro bono work to discuss their work. Be sure to choose speakers who have some inspirational stories of how their work has affected them personally as well as how they have provided an important role in insuring access.

2. Brainstorming

(Test Your Understanding Problem page 583; Outcomes 24-a and 24-d)

Ask students to brainstorm methods to improve the ability of persons facing eviction to protect their legal rights. Group student responses into two basic categories:

- Increase the availability of attorneys (mandatory pro bono, taxes to fund legal services, fee shifting statutes, shifting of responsibility to government regulators, etc.); or
- Decrease the need for attorneys (simplify processes and enable pro se assistance; relax unauthorized practice standards; increase processes for self-help; change the law to provide different or fewer rights).

Students will often generate more ideas from the first category than they will the second, which you can point out is a common response when considering access to justice issues.

3. Case Discussion: *Turner*

(Section 24.2, pages 558-66; Outcome 24-a)

As a "homework check" and to assess student mastery of the case, I sometimes use a minute paper to introduce this case in which I ask students to write the holding of the case. We then explore some of the key facts in the case and speculate on the future these might portend for other areas of access to justice. I ask them to consider how they might read the opinion if they were an advocate for expanding access and how they might read it if they wanted to limit its impact (as suggested in note 2, page 565). Some of the facts I emphasize as important to consider are:

1. Defendant faced possible incarceration.

Reading this case narrowly, the *Turner* case looks like a loss for advocates for access to justice as it limits the expansion of the right to counsel when individuals are facing loss of liberty, providing that "alternative" procedures may be sufficient to protect due process rights in these civil contempt cases. Reading the case broadly, one might argue that the *Turner* case is

concerned not with the right to counsel (which so often turns on the threat of incarceration) but on due process in any case in which someone is self-represented and there is a potential deprivation of a constitutionally protected interest (liberty OR property interests).

2. The case involved the issue of ability to pay

The court took pains to point out that this particular issue is similar to the decision made by courts to appoint counsel in the first instance. It could arguably be limited then to its facts as involving a uniquely simple and accessible issue. However, the court notes that even this issue might be more complicated in some cases, implying that the case-by-case analysis of the *Lassiter* opinion is the rule going forward even in civil contempt actions for nonpayment of child support.

3. The other side was unrepresented also

The fact that the court discusses the rights of the plaintiff in the opinion implies that due process requires that fairness and accuracy must be provided to *both* sides. This is a win generally for advocates for pro se litigants but a significant blow to those who would argue for a Gideon-like right to counsel in civil cases, since it would suggest that courts might be in a position of requiring counsel for both sides in cases involving significant constitutionally protected rights, thus raising costs.

4. The state was not a party

The court expressly distinguished this case from one in which the state is a party, recalling the language of prior opinions regarding due process concerns when the power of the state is directly opposed to an individual

We then explore the "alternatives" to appointed counsel.

The first alternative is the court's assistance. The trial court did not take any actions to protect the defendant. This may have been because the court would consider direct questioning of a litigant as violating a judicial duty of impartiality. At one time, any judicial action to assist pro se litigants was thought of as inappropriate, but today judges increasingly recognize the need to assist pro se litigants. In 2007 a comment was added to Rule 2.2 of the Model Code of Judicial Conduct, permitting "a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard." In fact, the Supreme Court opinion itself is an example of a court taking proactive steps to protect fundamental fairness. As the dissent noted, the court reviews an issue that not only was not raised at trial (there were no objections to lack of counsel or to due process violations), but was raised only in the limited frame of the right to counsel issue. The overall due process issue was actually raised in an *amicus* brief by the United States Solicitor General, which offered the solution that the Supreme Court ultimately adopted in the opinion.

The four elements required as "alternatives" to the right to counsel according to the court are: understandable notice; forms or other methods to assist the defendant in supplying relevant information; a hearing, with the opportunity to respond to questions about the information on the form (judicial questioning); and explicit findings.

The court implies that other steps might be alternative procedures that would make a procedure constitutionally significant, ("sometimes assistance other than purely legal assistance (here, say, that of a neutral social worker) can prove constitutionally sufficient."). Does this mean the court is endorsing the unauthorized practice of law? Probably not. More likely the court is endorsing court annexed services rather than independent practitioners, since it appears to be placing the onus on courts to take active steps to insure fairness.

4. Withdrawal from Appointed Representation

Depending on how widely used appointments are in your jurisdiction, there are several ways to approach this subject. There are basically three different models states use in providing counsel: a full-time office (such as public defenders offices); a limited list of contract attorneys, who may have some special training or qualifications, but whose full-time work is not these appointments; and a generalized appointment from the bar as a whole. The county in which UMKC is located is unique in the nation as far as I know, because every attorney licensed in the state (even law professors) who has either an office or residence in the county, is subject to appointment to represent juveniles in delinquency cases or parents in termination of parental rights cases. Barbara Glesner Fines, *Almost Pro-Bono: Judicial Appointments of Attorneys in Juvenile and Child Dependency Actions,* 72 UMKC L. Rev. 337 (2003). For this reason, I spend class time on the withdrawal motion, having students actually argue before a court (played by their peers) to try to withdraw from a case.

Arguments students typically make include:

1) Representation of the client is likely to result in the violation of the Rules of Professional Conduct. Rule 6.2(a).
   a) Defendant's Argument:
      i) Firm has no attorneys with any criminal defense or trial experience
      ii) Firm advises clients with respect to tax, accounting and financial transactions
      iii) Lack of time and resources for reasonable preparation for trial
   b) Prosecutor's Argument:
      i) Firm specializes in complicated tax matters and is therefore competent
      ii) Only cause is common law fraud, a simple cause of action which firm should be competent to defend
2) Representation of the client is likely to result in an unreasonable financial burden on the lawyer. Rule 6.2(b).
   a) Defendant's Argument:
      i) Firm would have to devote unreasonable resources for preparation for a trial

   ii) Firm might have to hire a criminal defense attorney, which would come at an unreasonable cost to the firm
b) Prosecutor's Argument:
   i) Lawyers should strive for 50 hours of pro bono service per year (rule 6.1)
   ii) 150 hours from a firm of four lawyers is not unreasonable

3) Representation of the client is likely to result in violation of the defendant's constitutional right to a fair trial with an opportunity to be provided adequate legal representation. Rule 6.2(b).
   a) Defendant's Argument: We are not competent in criminal defense work, and our lack of expertise and experience would effectively deprive the defendant of his constitutional right to counsel
   b) Prosecutor's Argument: The Constitution gives the defendant the right to counsel who is ultimately effective, but not the right to counsel of a particular quality or caliber. The firm's tax expertise overcomes its lack of criminal defense experience.

5. Limited Scope Representation

There are two approaches to this topic: as an opportunity to reinforce skills or as an opportunity to discuss policy tensions. In my course on Ethical Issues in Family Representation, I tend to emphasize the former, as limited scope representation is more common in that field. In my regular professional responsibility course, I emphasize the latter, using the issue as an example of reforming rules of professional conduct to increase access. The topic nicely reveals the tensions between quality and affordability and between self protectionism and access. Having students research their jurisdiction's approach to the topic of limited scope representation can also help frame the issue for discussion and debate.

If you choose to use the issue for a practical skills review, asking students to think about the kinds of cases that would make for effective limited scope and those that would not. A role play in which students counsel a client who would like discrete task representation can be very useful to demonstrate the difficulty of the required communication. I typically use an example of a client who comes to a family law attorney, who believes that he or she and his or her spouse have worked out all the issues in the divorce but who has been presented with a last minute request for maintenance (alimony) and who wants an attorney to simply give them some information on how likely it is that a court would award maintenance in their case. If you can find a guest speaker who is effectively using limited scope representation in his or her practice, this would be an excellent opportunity for students to hear more about how such a practice can work.

If you are more interested in exploring the policy tensions, the *Padilla* case, while not a limited scope representation case, demonstrates a powerful counter-tension in defining competence in terms of scope of representation. The case would have been so much simpler in terms of limited scope representation if the court had relied on the fact that the attorney misinformed the client about the immigration consequences, but the majority opinion makes it

clear that they consider affirmative advice about immigration consequences to be a central duty of effective representation.

Some of the key issues from the case to engage students in debate include the whether the collateral/direct line is useful for analysis; whether the positions of professional organizations should be influential in determining professional obligations; and whether misfeasance/ nonfeasance line should have been adopted by the majority.

The problems can help to focus students on the reach of the opinion. The first problem considers the problem of how far collateral consequences reach. In his concurring opinion, Justice Alito lists "civil commitment, civil forfeiture, the loss of the right to vote, disqualification from public benefits, ineligibility to possess firearms, dishonorable discharge from the Armed Forces, and loss of business or professional licenses" as areas where the Court's holding in *Padilla* may be extended. The problem focuses on two of these: loss of firearms and a resulting, loss of employment. However the problem is posed in a civil setting rather than criminal, so that malpractice would be the governing law rather than ineffective assistance of counsel.

The second problem is framed in a criminal setting. In the referenced case from Pennsylvania, the Supreme Court found that the attorney's failure to advise regarding the effect on pension rights did not constitute ineffective assistance of counsel:

> Not getting money as a consequence of breaching an employment contract cannot be equated with being forced to leave the country. Based on PEPFA's aim, procedure, and consequences, we cannot conclude forfeiture of an employment benefit is so enmeshed in the criminal process that it cannot be subjected to a direct versus collateral consequences analysis. Accordingly, we hold Padilla did not abrogate application of such analysis in cases that do not involve deportation. Frometa's general holding remains: a defendant's lack of knowledge of collateral consequences of the entry of a guilty plea does not undermine the validity of the plea, and counsel is therefore not constitutionally ineffective for failure to advise a defendant of the collateral consequences of a guilty plea.

Commonwealth v. Abraham, 62 A.3d 343, 350 (Pa. 2012).

6. The Relationship between Regulation of the Profession and Access to Justice
(Introductory Problem pages 555-56, Sections 24.4 & 24.5, pages 573-84; Outcome 24-a)

The introductory problem is taken (nearly verbatim) from Missouri Supreme Court Advisory Committee Formal Opinion 121 (see http://www.mobar.org/ethics/formalopinions/ frontpage.htm). The formal opinion, authored by my colleague Dean Ellen Suni, provides a thorough analysis of a problem that is very accessible for students.

You can follow up this discussion by revisiting the Test Your Understanding problem (page 583), asking students whether any of the ideas they have for access to justice in the

problem would require reforming or reinterpreting the rules of professional conduct. Conflict of interests is a particularly useful area to explore, both because students can always use more work on the doctrine, but because (as described on pages 582-83) conflicts is an area in which some reform has already occurred to facilitate access. In the problem, for example, conflict rules regarding attorneys representing class actions plaintiffs or jointly represented plaintiffs could make litigation on behalf of these clients less expensive and more efficient (though it may be at the cost of some individual right to direct the representation).

Chapter Twenty-Five: The Professional Monopoly

Outcomes, Assessments, and Assignments

Outcome 25-a: Reading and Analyzing Lawyer Regulation

Students should be able to identify alternative legal service providers in a particular area of practice and analyze from both a legal and policy perspective whether and why unauthorized practice of law restrictions should be applied to that legal service provider. In a situation in which they are called upon to apply a statute that defines the unauthorized practice of law by an attorney, they should be able to interpret the statute, argue for and against its applicability to the facts, argue for and against the validity of the statute as a regulation of legal practice, and use policy reasons to support these arguments.

Assignment:

Chapter 25.

Assessment:

The problem on pages 86-87 (from Chapter 4) can provide basic assessment of ability to argue the issue of unauthorized practice.

Outcome 25-b: Researching Issues in Professional Responsibility

Students should be able to locate and analyze restrictions on unauthorized practice.

Assignment:

Research problem 25-A, page 596.

Assessment:

To provide students an opportunity to self assess their research skills, ask students to report on their efforts to locate statutes and caselaw in your jurisdiction and the process they used for this research.

Suggested Classroom Learning Activities

1. Alternative Legal Services Providers

(Preliminary Problem, pages 585-86; Outcome 25-a)

I use the preliminary problem to frame the class discussion, asking student to identify alternative legal services providers in various practice areas and then analyze the degree to which those providers are likely to be considered to be practicing law without a license and why. The following are excerpts from some of the responses I have gotten from students.

Corporate planning

Accountants and business consultants are highly educated and trained to provide the specialized services they provide to corporations. These competitors have been a constant in corporate America and have established themselves as viable service providers. Accounting and consulting firms also usually retain attorneys within their companies to advise and oversee its operations which decrease the likelihood of an unauthorized practice of law suit. Federal administrative agencies that permit non-lawyers to appear before them (e.g., IRS, PTO, EPA) further insulate these professionals from UPL enforcement. Finally, the generally sophisticated nature of the client group lessens the risks of harm to them.

Bankruptcy

The "Competition"

- Debt Settlement Agencies
- Consumer Credit Counseling

Likely to be Challenged for ULP?

Debt settlement agencies are one of the biggest competitors to bankruptcy law firms, but are unlikely to be challenged for unauthorized practice of law as long as they stay within the firm boundaries of the practice of "debt settlement" and stay out of court.

The scope of the definition of "legal practice" for a bankruptcy attorney determines how closely a debt settlement agency comes to violating unauthorized legal practice rules. On one hand, the focus of the bankruptcy attorney's legal practice is the bankruptcy proceeding itself. If the attorney's practice is simply the litigation, a debt settlement agency isn't a close substitute. The debt settlement agency doesn't stand in the attorney's shoes and do the trial. Instead, it settles the case to avoid trial. If, however, the legal practice is defined as "helping the debtor to resolve his debts" the debt settlement agency is working within the realm of the attorney. Additionally, the debt settlement agency does the client a disservice because it will only report on one debt resolution alternative—the settlement—and will not counsel the client on the

litigation alternative. Contrast the legal practice in which the attorney can assist with either option.

There are, however, several reasons why debt consolidation firms could be potentially challenged for their unauthorized practice of law. In fact, several states attorneys general have recently filed lawsuits or administrative claims against various debt settlement agencies for unauthorized practice of law. Illinois Attorney General Lisa Madigan has filed suit against seven debt settlement companies in the last year, and is one of six attorneys general targeting Credit Solutions of America, a nationwide debt consolidation firm, with allegations including "fraudulent, deceptive, and illegal practices" and "false advertising."[50]

Torts

Insurance claims adjustors are major players in the settlement of tort claims. It is not likely that an insurance claims adjuster would be subject to a successful challenge of unauthorized practice of law. Claims adjusters have some professional responsibility through licensing of their own, arguably do not actually engage in the practice of law, and state laws are becoming more protective of laypeople engaging in roles that minimally overlap the practice of law.

First, public adjusting generally requires a separate license, or at least a license issued to the employing company. It is therefore not as if the claims adjusters are operating without at least some professional oversight. For example, Missouri requires a license issued by the state before engaging in public adjusting. The policy of protecting clients is likely accomplished through the recourse available under such licensing and would not require the extra oversight of a state bar or the courts. Where the valuation process of a claim is confined to investigation and adjustment with a claimant, there is no need for further policy protections to the court—as there are no appearances or interactions necessary. While there is arguably a need to protect lawyers from competition in this area, the strong comity of antitrust concerns alleviates the weight of an argument that claims adjusting belongs to lawyers.

Second, insurance adjusters are not necessarily engaging in the practice of law. Though some definitions of the "practice of law" are broadly defined and interpreted, the process of valuation and disposition of a claim does not typify the practice of law, particularly when the relationship remains between a claimant and her insurer. This view has been expressed by the Missouri Supreme Court, as noted in the text in *Liberty Mutual Ins. Co. v. Jones*, 130 S.W.2d 945, 960 (Mo. 1939). The Illinois Supreme Court highlighted some risk to this position when adjusters are negotiating against opposing parties and acting in an adversarial capacity like lawyers and on behalf of a client. However, even then, adjusters may not fall under statutes

[50] CBS News, *Beware Debt Settlement Companies* (March 29, 2010), *available at* http://www.cbsnews.com/stories/2010/03/29/earlyshow/contributors/susankoeppen/main6343617.shtml?tag=cbsnewsTwoColUpperPromoArea

prohibiting unauthorized practice of law, especially in jurisdictions with less descriptive definitions.

Finally, state legislatures are progressing to protect more laypersons whose professions compare to the practice of law. The Arizona legislature appears to have changed the basis of law on which *In re Creasy*, 12 P.3d 2124 (Ariz. 2000) was decided, as noted in second note following the case. Collateral to this movement might also be the tightening of language surrounding the definition of the "practice of law." For example, the holding in *Creasy* rested narrowly on the particular facts that the lawyer had been disbarred, was not only negotiating but also entering appearances during arbitration, and was acting in a lawyerly capacity during a deposition-like examination. Thus, general claims adjusters, who were not previously licensed attorneys, perform services less like the unauthorized practice of law that took shape in *Creasy* and more like laypersons engaged in comparable but certainly different professions. Instead, the average adjuster job description does not include court appearances and depositions.

Labor & Employment

The Internet is the greatest source of competition for the Labor & Employment law firm because websites such as "LegalZoom" allow employers to search for standardized forms such as contracts and non-compete agreements that the employer may use to contract with employees by filling in the blanks with the employee's name and relevant specific facts. In addition, websites such as "FindLaw" allow employers to research employment law issues and obtain (computer generated) legal counseling inexpensively compared to hiring a lawyer to consult with before making business or personnel decisions.

Clients are drawn to using the Internet instead of hiring an attorney because the Internet provides a more affordable mode for a client to obtain legal advice. In addition, clients relying on the Internet may find the information they are seeking (disregarding the accuracy of the information) more quickly than they would by hiring an attorney who has several clients to help and may not be available to respond right away. The Internet is also considered a useful tool because the accessibility of legal advice on the Internet diminishes the chance that the practice of law will become a monopoly that requires hiring an attorney to obtain legal counseling.

However, there are negative aspects to relying on Internet websites for legal counseling. Computers are simply machines and therefore cannot be relied upon for their competency in giving legal advice to each individual client who has very unique needs. On the contrary, employers and employees should consult with labor and employment lawyers who are licensed practitioners who are competent and skilled in analyzing the strengths and weaknesses of each client's unique position. Computer-generated form contracts containing identical boilerplate language cannot possibly adequately address each client's unique situation. Instead, employers and employees should consult with a live attorney who will listen to, consider, evaluate, and address the client's distinctive facts and circumstances.

The Internet, particularly websites that provide legal forms, research, and/or advice such as LegalZoom and FindLaw, is not likely to be challenged for the unauthorized practice of law because as we discussed in class, each individual has a constitutional right to represent themselves in legal matters. That particular individual right is protected by the First and Fourteenth Amendments of the United States Constitution. In order to represent themselves, individuals must have access to legal research and legal forms used in practice; because websites such as LegalZoom and FindLaw provide the tools to assist individuals in their constitutional right to provide their own legal representation, Internet websites that assist individuals in the practice of law will not likely be shut down.

Sports Law

In the area of Sports Law, sports agents, financial planners, the internet, sports figures, coaches/athletic departments, and parents may provide similar services as lawyers. Sports agents are most likely the greatest source of competition in the legal field for sports lawyers. However, they would most likely not be challenged for unauthorized practice of law, because they serve a different purpose than a sports lawyer. A sports agent's services would probably focus most on negotiating on behalf of their client. While this may be something that a sports lawyer would do, the agent would probably not focus so much on the legal aspects of the contract, and more on the financial and professional aspects for the client. The more detail oriented the sports agent is in the legal terms of a contract, the more it would seem that they were providing a legal service. A sports agent would also probably not be likely to represent himself to a client as a lawyer unless he or she was one. However, it is possible that if an agent who is not licensed to practice law is not clear about not being a lawyer, a client may wrongly believe that an agent is also acting as a lawyer.

Sports agency is also a gray area because many sports agents are actually lawyers, or have lawyers that work for them. Because sports agents may be trained in the law and work closely with lawyers, they probably are well aware that there is a fine line between actually practicing law and acting as a sports agent. Because of this knowledge, they are more likely to be careful not to cross this line, leaving that area for lawyers that work with them.

Criminal Law

In the practice of criminal law the traditional sources of competition in civil issues, such as licensed accountants, are not present. One source of competition to criminal lawyers may be *pro se* representation. In one report, over thirty-one percent of criminal appellate filings and over seventy-one percent of inmate filings were self represented. Madelynn Herman, *Pro Se Statics, National Center for State Courts*, June 21, 2006 (available at https://nac mnet.org/sites/default/files/04Greacen_ProSeStatisticsSummary.pdf.) Though the numbers are impressive, there is a Constitutional right to self-representation, and as such, the *pro se*

representative is not so much an adversary of criminal law as it is an appropriate exercise of right.

2. Gatekeepers Discussion: *In re Creasy*

(Section 25.1, pages 586-594; Outcome 25-a)

To examine the jurisdictional issue in this case, I ask students to test out their understanding of what "inherent power" means by explaining the concept to the person next to them. Some examples of good answers I've gotten:

- Inherent power doesn't come from legislative or constitutional authority—it's "inherent" part of what it means to be a court. A court has to have certain powers to function.
- One can think of the concept as similar to the "necessary and proper" clause of the constitution—what's necessary and proper for a court to function.

I ask students to give examples of the court exercise its inherent authority. Most will mention violating a court order. Other examples I mention include the power to exclude evidence, to disqualify an attorney, to make rules governing the conduct of those before the court, and to admit attorneys to practice law—whether pro hac vice or to the bar as a whole.

I ask in what sense *Creasy* was a contempt case. Students should recognize that the case involved the violation of the court's order of disbarment. I then reinforce the picture by reminding students that Creasy was a disbarred attorney who continued to provide legal services after his disbarment—specifically, private arbitration of a claim between an insured and an insurer. This is an action brought at the suggestion of the state bar—but notice it is an "in re" action—it is actually in the nature of an action by the court against Creasy to enforce the court's order. That's what made the jurisdictional issue easy.

The margin notes in the case ask students to consider the political battles and policy questions that underlie the inherent powers doctrine. This can make an interesting and spirited discussion if you have some political science students in your course.

Note 5 after the case asks students to consider whether and why they might choose not to be licensed if they are practicing in allied fields. The risk, of course, is unauthorized practice. The reasons some law school graduates might choose not to be licensed in these fields range from the financial (bar dues) or practical (bar exams) to strategic considerations (different ethical standards for matters such as confidentiality or conflicts).

3. Defining the Practice of Law

(Section 25.1 and 25.2, pages 59-96; Outcomes 25-a and 25-b)

When we turn to the definition of the practice of law discussion from the case and in Section 25.2, I ask students to think again about the "competition" they identified in the opening brainstorming exercise and how it would fare under the balancing text described on pages 595. If I have assigned the research assignment, I ask them to also consider how the service provider would fare under the state definitions they had located.

Obviously there is a great deal of uncertainty in the boundaries of UPL. To alleviate some anxiety, I ask students to identify some pretty clear situations of unauthorized practice:

- Appearing in court on behalf of someone else,
- Advocating on behalf of someone in almost any setting (except where the federal statute or state court allows an exception—e.g., social security hearings), or
- Giving legal advice tailored to individual facts (We work on trying to distinguish giving legal information and giving legal advice).

4. Review Problem

(Test Your Understanding Problem, pages 596-98; Outcome 25-a)

In the case upon which this problem is based, a layperson drafted three different documents using three different approaches:

- He prepared a power of attorney apparently without use of any particular form or service.
- He prepared a will using a commercial form service (Quicken lawyer).
- He prepared a "Renunciation of Right to Administration and the Statement of Agreement to Waive Bond" using forms provided by the Probate Court.

The court had little difficulty deciding that the first was UPL and the last was not. The use of the computer form generating software was the sticking point, but the court ultimately concluded that the attorney did not act as a mere scrivener.

> The novel question here is whether respondent's actions in filling in the blanks in a computer-generated generic will constitute the practice of law. Respondent selected the will form, filled in the information given by Ms. Weiss, and arranged the execution of the will at the hospital. Although these facts are not in themselves conclusive, the omission of facts indicating Ms. Weiss's involvement is significant. There is no evidence Ms. Weiss reviewed the will once it was typed. The will was not typed in her presence and although respondent relates the details of what Ms. Weiss told him to do, there is no

> indication he contemporaneously recorded her instructions and then simply transferred the information to the form.
>
> *Franklin v. Chavis*, 371 S.C. 527, 532 (S.C. 2007).

What was especially interesting in the case as well was the range of remedies the court was asked to impose. These included:

- Enjoining the respondent from the unauthorized practice of law (granted)
- Removing respondent as personal representative (denied, but ordered that he not receive any fee as personal representative of the estate and disgorge any fees already received)
- Disallowing respondent to use estate funds to defend the action (denied)
- Declaring the will void (denied. "If the July 31 will was in fact drafted pursuant to Ms. Weiss's true wishes, it should not be invalidated simply because it was drafted by a nonlawyer.")
- Ordering restitution for "alleged financial missteps by respondent" in managing estate assets. (Denied, "There is no private right of action in South Carolina for the unauthorized practice of law…. Petitioners' claim for restitution is based on an alleged breach of fiduciary duty and is not appropriate relief in an action based on the unauthorized practice of law")

Chapter Twenty-Six: Commercial Speech: Advertising and Solicitation

Outcomes, Assessments, and Assignments

Outcome 26-a: Reading and Analyzing Lawyer Regulation

Students should be able to describe the interests at stake in attorney advertising and solicitation and identify and analyze constitutional issues in state regulation of attorney advertising and solicitation.

Assignment:

Chapter 26.

Assessment:

A quiz can test student understanding of the basic regulations and an exercise in which students analyze a particular marketing scheme will permit assessment of student ability to manage the constitutional arguments.

Outcome 26-b: Formation of Professional Identity

Students should be able to develop a personal marketing plan that ethically and effectively develops clients.

Assignment:

In our Solo and Small Firm Practice course, we require students to prepare an entire marketing plan. While I don't ordinarily assign this to the Professional Responsibility students, I do ask them to reflect on one aspect from this assignment: identifying their strengths and their market.

Assessment:

See appendix for assessing reflective learning.

Outcome 26-c: Researching Issues in Professional Responsibility

Students should be able to locate constitutional authority on the regulation of attorney advertising.

Assignment:

Research Problem page 626.

Assessment:

As a research assignment, this problem takes students back to the first type of research they likely learned: case law research. The critical assessment here is more the students ability to choose a regulation that raises constitutional issues and frame a search that will provide insights. If your state does not have extensive advertising regulation, you may wish to assign instead a different state's restrictions or create proposed restrictions for students to evaluate and research.

Suggested Classroom Learning Activities

1. Reputation and Referrals

(Section 26.2, pages 601-02: Outcome 26-b)

I begin by asking students to think about how they would find an attorney to help them if they had a criminal, property, or family law matter and didn't already know an attorney in that field. I then ask them to think about themselves seven years in the future and ask, "To which one of your classmates would you refer a client and why?" I don't ask students to provide names of course, but I ask for the qualities that make that choice obvious to them. The discussion will quickly help students realize how important personal referrals and reputation will be to their future career. Finally, I ask them whether the ways they would choose an attorney are the ways most people would use to choose an attorney, emphasizing the differential access to information in our society about lawyers and law (last paragraph, page 603).

2. The Constitutional Framework—Incomplete Outline

This chapter has a great deal of doctrinal content, which could easily take up the entire class to review. Students want some kind of summary or overview to check their understanding. I provide the following incomplete outline as a study guide for them to use as they read the chapter.

1) The Constitutional Framework
   a) Attorney advertising is protected as _____ speech. *Bates v. State Bar*, 433 U.S. 350(1977)(advertising prices)
   b) *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980) developed standard for commercial speech:
      i) Threshold test: whether the prohibited advertising is _____, non-misleading speech regarding a lawful activity.

ii) If commercial speech concerns lawful activity & is not _____, government regulation is constitutional only if
(1) Government has a _____ in regulation
(2) Regulation _____ the government interest
(3) Regulation is _____ to serve that interest.

c) Regulations may not simply state lists of permitted statements and prohibiting everything else. _____, 455 U.S. 191 (1982)(advertising of areas of practice).

d) Total bans of categories of marketing are difficult to uphold. The most notable example of a type of marketing that can be banned is_____. *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985)(cannot totally ban use of pictures and diagrams without making specific finding that are misleading)

2) Prohibitions of false and misleading communication

a) The state may prohibit false and misleading communications communications ("material misrepresentation of fact or law or _____." Model Rule 7.1)

b) *Bates* and its progeny have held that states may not absolutely prohibit commercial advertising that is merely potentially misleading. However, advertising that is _____ may be banned.

c) Many states provide a "laundry list" of communications that it considers "presumptively misleading" Some examples are:_____.

d) Specialization certifications had been considered misleading and most states prohibited them until _____, 496 U.S. 91 (1990), where the Supreme Court held that a state cannot prevent a lawyer from truthfully and non-deceptively representing that he/she is certified by a third party as a specialist in a particular area of practice.

e) One approach to presumptively misleading statements is to require that the statement be subject to objective verification.

3) Disclaimer Requirements

a) An increasingly common approach to potentially misleading communications is to require some disclosure or disclaimer. Some examples of disclaimers are:
_____

b) The Supreme Court in *Milavetz, Gallop & Milavetz, P.A. v. United States*, upheld the requirement of the bankruptcy code that attorneys are included in the requirement to include in all advertisements the statement,_____.

c) The _____ test that applies to regulations of commercial speech that merely compel disclosures is less rigorous than the First Amendment test applied to regulations that restrict speech. Hayes v. NY Atty Grievance Comm, text page 613

4) Prohibitions of Solicitation (Rule _____)

a) Advertising is to public at large: solicitation is directed toward particular people

b) Bans on personal solicitation have been approved because risk of overreaching and misleading is high and ability to regulate low. The court in *Ohralik v. Ohio State Bar Assn*., 436 U.S. 447 (1978) held that a compelling state interest in protecting against fraud, undue influence & overreaching means state could constitutionally ban "in-person solicitation for _____ under circumstances likely to result in adverse consequences."
   i) Rule exceptions to the ban include_____
   ii) *In re Primus*, 436 U.S. 412 (1978) in-person solicitation involving _____ permitted so long as not misleading, overbearing or deceptive.

5) Referral Fees
   a) Note that referrals are not prohibited, may even solicit referrals; what is prohibited is _____.
   b) A reciprocal referral arrangements is prohibited if it _____.
   c) Exceptions are narrowly construed: e.g., "qualified referral service" doesn't mean any commercial referral arrangement
   d) Rule _____ governs fee-splitting with attorneys who aren't in the same firm. It is sometimes difficult to tell whether an attorney is being paid $500 for simply referring a case to another attorney or whether the attorney truly has completed $500 worth of initial work on a case. Some attorneys deliberately exploit this vagueness, entering into explicit referral arrangements with other attorneys in which the receiving attorney agrees to "split fees" with the referring attorney at a set amount, regardless of work performed. The receiving attorney runs the risk not only of violation of the rules on referral fees but also that the referring attorney may be engaging in more than simply passive referral, but may be _____ clients in violation of the rules. The receiving attorney would be equally subject to discipline for either of these violations. In addition to discipline, these veiled attempts to skirt the rule prohibiting referral fees place the referring attorney at risk of _____.

3. Evaluating Marketing

(Section 26.2 and 26.3, pages 601-610; Outcome 26-a)

I ask students to bring in examples of lawyer web sites. I ask students to locate two websites of attorneys in their chosen field of practice and evaluate those websites for effectiveness as well as for ethical issues. Students submit their reports to me before class so I can choose some for general discussion in class.

Website Evaluation

Choose an area of private practice that is related to the area of law you wish to practice. Find two attorneys websites or blogs in this area of law. Provide the URL of the site and answer the following questions:

1. What appears to be the goal of this website/blog?
2. Whom is the attorney targeting as an audience?
3. Do you think the website/blog is effective? Why or why not?
4. Does the website/blog include any disclaimers/disclosures?
5. Does the website/blog raise any issues regarding professional regulation?

This analysis can help students to see that much of the regulation of attorney advertising impacts those attorneys who are serving individuals, rather than attorneys whose business is primarily serving more sophisticated entities or other attorneys. They also can see that attorneys can use public media for public educational purposes. Finally, students will inevitably find websites that are in poor taste or simply bad advertising and a few that clearly violate rules. This will raise the question of why regulations don't deter these practices which can lead to a discussion of the resource limitations of disciplinary authorities and the relative priorities they have.

In choosing websites to frame the discussion, I look for examples that illustrate the following materials from the chapter (if students have not provided these, you can always simply use the Alexander & Catalano website http://alexanderandcatalano.com, which provides client testimonials, a "results" page, and copies of their many entertaining television advertisements, most of which the Second Circuit found could not be constitutionally banned.):

- An advertisement that looks like a referral service (page 603).
- A range of advertisements that are inherently misleading, potentially misleading, and unduly manipulative.
- An example of disclaimers (here's a pretty comprehensive one: http://www.lieff cabraser.com/Attorney-Advertising-Disclaimer.shtml).
- An example of a creative compliance with the Bankruptcy Act's required disclosure - For example, many bankruptcy firms say "We are a designated debt relief agency under federal law and we provide legal assistance to clients seeking relief under the bankruptcy code." "Section 528 also gives Milavetz flexibility to tailor the disclosures to its individual circumstances, as long as the resulting statements are "substantially similar" to the statutory examples. §§528(a)(4) and (b)(2)(B)." *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 252 (2010).

4. Evaluating Disclaimers

(*Hayes v. NY Atty Grievance Commn*, pages 611-617; Outcome 26-a)

Rather than review the case itself, I simply restate the case briefly and then ask students to apply the analysis to several disclaimers required by different states.

Hayes briefly: the Second Circuit reviewed several required disclaimers:

1. "The NBTA is not affiliated with a government authority"—upheld under direct authority of *Peel* even though no specific proof that consumers would be misled because this was the precise issue raised in Peel and upon which there was agreement from six justices. (Question 1 after the case asks how the court resolved the *Peel/ Ibanez* divide—this is the answer, they applied *Peel* where they had to and *Ibanez* to the rest.)

2. "Certification is not a requirement to practice law"—too speculative a confusion to uphold the regulation without proof of that confusion (as required by *Ibanez*).

3. "Certification does not indicate greater competence"—as likely to be misleading as to avoid confusion—"does not serve a substantial state interest, is far more intrusive than necessary, and is entirely unsupported by the record" as violating the First Amendment's protections for commercial speech.

4. As to this attorney, disclosures must be "prominently made,"—unconstitutionally vague—notice that the court requires one of two methods to resolve this—notice and opportunity to correct or appellate review.

Now, apply the analysis there to the following disclaimers:

- "No representation is made about the quality of legal services to be performed or the expertise of the lawyer performing such services." (upheld in *Lyon v. Alabama State Bar,* 451 So.2d 1367 (Ala. 1984)
- Any television advertisements by lawyers who represent workers' compensation claimants must include a conspicuous statement that "making a false or misleading statement or representation to obtain or deny workers' compensation benefits is a crime." (struck down in *Tillman v. Miller*, 133 F.3d 1402 (11th Cir. 1998))
- If an attorney advertises specific or cumulative case results, the results must be preceded by a disclaimer that "(i) puts the case results in a context that is not misleading; (ii) states that case results depend upon a variety of factors unique to each case; and (iii) further states that case results do not guarantee or predict a similar result in any future case undertaken by the lawyer…. The disclaimer shall be in bold type face and uppercase letters in a font size that is at least as large as the largest text used to advertise the specific or cumulative case results and in the same color and against the same colored background

as the text used to advertise the specific or cumulative case results." (Required in attorney's blog in *Hunter v. Virginia State Bar*, Va., No. 121472, 2/28/13).

5. Understanding Solicitation

I begin by noting that, just as attorneys sometimes walk the ethical line between prohibited referral fees and acceptable fee splitting agreements, so too there are a number of attorneys who believe that in-person solicitation is acceptable if only they call it something else and caution the class against being misled into this viewpoint.

I use a hypothetical in which an attorney is at the courthouse and sees an individual crying, goes up to them and asks, "Can I help you?" and proceeds to represent that individual for a fee and contrast that with the attorney who is approached by an individual who asks, "Are you a lawyer?" and then proceeds to hire the attorney. The first is solicitation and the second is not. The students will object that the first situation is simply good-heartedness, but the fact that the attorney is charging is pretty clear evidence of at least some motivation of pecuniary gain. The students will object that the second situation doesn't look any different than the first, at which point I agree and so warn them that just because it isn't technically solicitation, they run a significant risk of generating business this way.

We then look at targeted direct mail, which is solicitation in form, but does not present the type of pressured environment of in-person solicitation and so, cannot be subject to a flat ban. We look at our local rules limitations on targeted direct mail and I distribute some examples for them to consider. Again, this is an area where you can ask students to bring in solicitations they have received. This is how I have built up my stock of show and tell items.

6. Debating Dignity
(Section 26.5, pages 624-27; Outcome 26-a)

I close the class with a brief debate on dignity as a professional value. We examine a series of advertisements by personal injury attorneys and ask what messages those advertisements are sending about the profession. I challenge students to consider whether "dignity" is a value that can be exploited to restrict access to legal services or the practices of certain cultural or political groups, revisiting the discussion from the chapter on admissions about "good moral character." I contrast that with the empirical studies of the effect of advertising on public perceptions of attorneys. This often leads to a discussion of popular culture depictions of attorneys, which takes us full circle to Chapter One.

7. Marketing Plans
(Preliminary problem, page 599 or alternative assignment; Outcome 26-b)

I do not review marketing plans in class, but I find the assignment of a reflection or plan on the student's skills and career plans to be an effective tool for professional identity formation under the guise of "practical skills."

Here is the assignment I require:

Marketing Plan

1. The product

What qualities, experience, values, passions, and networks do you have that make you a valuable lawyer?

2. The market

What groups or interests do you seek to serve in your legal practice

3. The plan

How will you reach the market(s) you have chosen? Choose methods that are ethical and realistic given who you are and what you are selling.

The business plan must be no less than 2 and no more than 5 typewritten, double-spaced pages (including any appendices/exhibits you may choose to attach) with 1-inch margins and reasonable size font. Your plan will be graded based primarily on evidence of thought and effort, consistency from beginning to end, soundness of plan, compliance with legal and ethical requirements and creativity.

Unit Seven Review

I have given parts of the Practice Context Review problem on pages 628-29 as final exam questions, but the problem is much better as a discussion opportunity, whether in class or in an online forum. Each of the proposals raises issues of the balance between competence and loyalty to clients and the availability of access to attorneys. Legal challenges to the proposals raise the issue of the inherent authority of the courts and constitutional rights to counsel.

Appendix A: Incorporating Reflection into Your Course

As our clinical colleagues have taught us, personal written reflection can be very effective if the students are reflecting on genuine experience and observations, rather than reflection that is merely an academic exercise. (I know my reflection assignment is not very effective when students ask, "Do you want us to use footnotes?") The textbook contains several "Reflective Practice" prompts. Reflective prompts can often be effective if they are statements of strong opinion or concrete descriptions of events against which students can react and reflect. I do warn students not to write about circumstances at work that would violate the confidentiality of another person, particularly a client.

Let the students know in the beginning of the course what they should do with these assignments. If you do not intend on using reflective practice in your course, you can simply suggest to students that these assignments are for their personal reflection and you will not be formally including them into the course requirements. You may choose to invite students to discuss any of these topics among themselves or with you nonetheless.

If you do intend to use reflective essays, give the students clear guidelines on minimum (and maximum) number of words or pages necessary to fulfill the assignment. Explain your purpose in assigning the reflective learning essays. Students want to know how this assignment is relevant to the practice of law. A few words on that go a long way toward insuring the success of the assignment.

In addition, you will need to make the following choices and communicate them to your students in your syllabus.

- ✓ You can assign all or only some of the reflections in the text. You can provide other reflection prompts to the students different from or in addition to the text assignments. I have given students options to choose from among several reflections, making the process of sharing personal thoughts more comfortable.
- ✓ You can ask for public reflections (e.g., on a threaded discussion list forum in your web-based course management system) or private reflections (to be read only by you). You can even provide for anonymous reflection. When I first began assigning reflective essays, I was concerned that students would be constrained in their reflections by the fact that I would know who they were. Consequently, I permitted students to submit their essays using a mid-term exam number. I told them that, if I received the same number of essays as there were students in the class and if the quality of those journal essays was such that they all met the minimum requirements, I would not "de-code" the exam numbers they used to identify themselves for this assignment. In the six years I used this method, I never had a student so totally rebel against the assignment that I had to break anonymity. I abandoned the practice

because often the students who revealed the most personal information chose voluntarily to personally discuss the content of their essay with me and I concluded that if the students did not trust my discretion in reading their reflections, a mid-term exam number system would not be sufficient to instill that trust.

- ✓ You can incorporate reflections into the course grade or simply indicate that they are a required part of the course. On this point, I have come to the conclusion that "grading" personal reflective essays beyond a rather basic assessment of form and effort is a pretty silly process. I found that I ended up grading the student's writing ability, or my perception of their "sincerity" and the students end up writing insincere or overly-cautious essays for fear of a bad grade. However, you may wonder how you can have the students take a non-graded assignment seriously. I tell the students that the assignment is required: they will receive an "F" for 10% of their grade if they do not do the assignment or if their response is so superficial and chaotic as to indicate that they did not take the assignment at all seriously. That, along with the personal investment one must make in any writing of this type, generally does the trick. In addition, I provide feedback in the form of a rubric, on which I provide students feedback on my impressions of the reflection.

Reflective prompts work best when students are asked to reflect upon their experience or observations. Direct students to first identify the experience or observation which the reflection brings to mind, then their attitudes and emotional responses to the situation, and finally their questions or insights that reflection on the experience and their reaction to it brings.

Students sometimes often need guidance to compose effective reflective writing. Some students just don't get it, or don't want to get it. So you will have questions like "Do we have to do research for this?" "Should we provide citations?" "How about a paper on whether pro bono work should be required?" You will need to emphasize several times throughout the semester that this is not a research paper, not a policy position paper, not a legal analysis paper; that the paper is *personal reflective* writing. Taking some time to explain the rationale for reflective writing is important. I share this quote with the students:

> Reflection gives meaning to experience; it turns experience into practice, links past and present experiences, and prepares the individual for future practice. It is the "hallmark of professional behavior."[51]

[51] Margaret M. Plack, Maryanne Driscoll, et. al., *A Method for Assessing Reflective Journal Writing*, 34:4 J. ALLIED HEALTH 199, 200 (2005)(*quoting* Shepard KF, Jensen GM (eds): Handbook of Teaching for Physical Therapists. Boston, MA: Butterworth-Heinemann; 1997).

Rubric for Assessment of Reflective Essays and Journals[52]

	UNDEVELOPED	DEVELOPING	SKILLED
DESCRIBING EXPERIENCE Student provides a description of the experience, observation, activity, reading, etc. upon which he or she is reflecting	Unclear and vague	Clear but general	Clear and focused on the specific aspects that challenge the student
DESCRIBING RESPONSE Student provides a description of their intellectual and emotional response to the experience	Unclear and vague	Some response but limited to one domain (e.g., only emotional, intellectual) or to reflection only, without indication of conscious contemporaneous reflection.	Clear and focused description of the feelings, thoughts, and questions raised by the student at the time of the experience and upon reflection.
GENERAL REFLECTION Evidence that the student has questioned or evaluated their prior perceptions, actions, or beliefs	Minimal reflection – No personal reflection or limited to description of general opinions and behaviors without reflection on underlying assumptions, habits, or values driving those opinions or behaviors.	Reflection – Making connection between student's personal assumptions, habits, or values and the opinions or behaviors upon which the student is reflecting.	Critical reflection – Critical evaluation (questioning, examining more closely) student's personal assumptions, habits, or values and their connection to the opinions or behaviors upon which the student is reflecting in light of other perspectives.
DIRECTED TOPIC REFLECTION	Minimal reflection – No personal	Reflection – Making connection between	Critical reflection – Critical evaluation

[52] This rubric was developed with the collaboration with Professor Margaret Reuter as a part of the Fall 2013 NIFTEP conference on assessing professionalism.

Evidence that the student has questioned or evaluated their prior perceptions, actions, or beliefs about (Collaboration, Professionalism, Autonomy, etc.)	reflection or limited to description of general opinions and behaviors without reflection on underlying assumptions, habits, or values driving those opinions or behaviors.	student's personal assumptions, habits, or values and the opinions or behaviors upon which the student is reflecting.	(questioning, examining more closely) student's personal assumptions, habits, or values and their connection to the opinions or behaviors upon which the student is reflecting in light of other perspectives.
USING INSIGHTS Student's reflection leads to plans for future action	Students reflection is entirely backward looking, with no indication of how the student will use the insights and skills gained.	Student has generalized statements regarding how the reflection will direct future actions or beliefs	Student provides concrete plans for further action or reflection for a specific purpose such as developing skills, improving self-understanding, or refining belief systems
CONNECTIONS TO READING/RESEARCH Student uses coursework, reading, or independent research to advance reflection as appropriate.	Does not include any reference to outside reading or research to inform reflection	Reflection refers to past readings or research in a descriptive or citation fashion with little indication of motivation to use reading or research to inform reflection	Connects reflection to past readings and research and indicates efforts to re-read or conduct additional research to learn more about aspects of the experience upon which reflection occurs. Describes specific insights or extensions of reflection gained from that reading and research.
CONNECTIONS TO PEOPLE Student engages instructors, mentors,	Demonstrates no effort to engage others in reflecting on the experience or insights.	Describes some conversations or interviews regarding the experience or	Demonstrates meaningful conversations with others to test ideas and gain insights on

colleagues, and others in conversations about reflection as appropriate.		reflection but only in an incidental fashion, rather than as an effort to test ideas or gain insights	the experience and reflection.
WRITING QUALITY Quality of writing indicates careful attention to reflective practice by providing clear topic, using concrete and precise language, organizing thoughts for the reader, and proofreading essay for grammar, punctuation, and spelling	Unfocused, unorganized, vague, and sloppy	Some focus and organization. Language has some precision. Essay was proofread	Topic(s) are clear and specific, descriptions use concrete and precise language and insights are precise and clear, Organization is apparent and effective. Essay has been proofread for grammar, punctuation, and spelling errors.
Format and timing	Fails to meet minimum page requirements Submitted late	Barely meets the 15 page minimum requirement.	Total page count over 20.

Even if you do not provide points to student reflections, these reflections do require some dialogue in response, sometime simply asking further questions about what the student has written, sometimes sharing your own perspective, always thanking the students for their effort. I do try to provide individual feedback on each assignment, even if it is simply "Thank you for your reflection "with some acknowledgement of the content, such as "you were not alone in concluding that _____" or "I agree that _____" If questions or reflection appear shallow or insincere, I primarily ask additional questions to prompt more thoughtful responses in future reflection.

Appendix B: Incorporating Research Training into Your Course[53]

Research skills are critical to practice generally. According to West Publishing Company's research, associates at a law firm can expect to spend 45% of the percent of his time conducting legal research. That percentage decreases with time, but even for attorneys who have been with a firm for five or more years, 40 percent of their time is spent on legal research. West Publishing, *White Paper: Research Skills for Lawyers and Law Students* (2007) at http://west.thomson.com/pdf/librarian/Legal_Research_white_paper.pdf.

However, incorporating research instruction and exercises into Professional Responsibility is especially important because too many attorneys still use a solely intuitive approach to resolving professional responsibility issues. The regulation of practice has become far too complex for an uninformed personal approach to resolution. Accordingly, throughout the course, I emphasize to students the importance of researching for standards and guidance. learning outcomes of those classes.

Legal research can help to provide context and clarity, counteracting significant misconceptions about the indeterminacy of law. Students in the professional responsibility course expect clarity and predictability from "rules" that is simply not present in a system with so much discretion built in. Traditional first-year legal research instruction, in which problems are pre-researched and designed so that all students will find the "right" answer, can further this misconception. Thus, it can be helpful to student understanding to devise problems that are open-ended or for which there is no direct authority.

Any research helps to reinforce the important message about how the practice is regulated and to counteract the misconceptions they may bring to the course. The MPRE is a powerful assessment that drives the students' learning; however it sends a message that the law regulating lawyers is a unitary system (that is, discipline, even though most attorney regulation today comes in the form of liability rules, procedural regulations, and private enforcement mechanisms); consists of uniform laws (when in fact there are significant local variations) and is predictable enough to be subject to multiple choice testing (even though most of the truly difficult questions in legal ethics require judgment and discretion). To the extent the most powerful assessment the students face cannot possibly test the breadth and variety of law and so conveys an overly simplistic picture of regulation of the profession, the resulting misconceptions can be difficult to dislodge. Incorporating research is one of the most powerful ways to show that the profession is regulated from multiple sources of law, with diverse and even conflicting standards, and with significant discretion built in.

[53] For more discussion of incorporating research skills generally into the curriculum, see Barbara Glesner Fines, *What Legal Research Instruction Reveals About Incorporating Skills Throughout the Curriculum,* 2013 J. DISP. RESOL. 259 (2013), from which I have drawn some of this discussion

I cannot stress how important and useful it is to establish a collaborative partnership with the law librarians as you incorporate research into your courses. Make sure students understand that often the best place to start research is with a person rather than a computer or a book. Research librarians are the persons they should think of as the persons to ask.

Assessment of research can be based on process or results. I look for the following indications of research skill in student reports of their process and in the results they produce.

Identifying the Problem: Did the student read/listen carefully and understand fully what the question was they were being asked and what kind of research problem it entailed? (See page 442 of text)

Appropriate Search Approach: Did students choose an appropriate search type for the type of research problem they were working on? For example, were they looking for a known item (a particular case or rule that they know exists already) or any information on a subject they have identified by type of law or institutional source (e.g., something on the exception to the attorney-client privilege, or something that they know would be found in the rules of conduct). Do they need general background research to fully inform them of the issues and laws that might apply to their problem?

Search vocabulary: Did the students construct appropriate search terms and choose appropriately between human mediated (e.g. indices, tables of contents, key numbers, etc.) or computer algorithm (terms and connectors or natural language searches) methods to search with that vocabulary?

Efficiency of research: Did the student conduct a search that resulted in the appropriate balance between recall (finding all available resources) and precision (finding only the relevant resources)? Did they choose cost-effective methods?

Analysis of results: Did the students thoroughly read the resources found to determine whether the resource indeed answer the problem and whether here is a need for more research. Did they conduct a citation analysis to determine if the authority located is valid and the most current?

Iteration: Did the student use the results of preliminary searches to inform subsequent searches, keeping track of their research steps to inform the process?

Reporting: Did the student communicate the research results clearly, accurately, completely, and precisely in the format required for the problem?

Appendix C: Client Interviewing Role Playing Exercise

Rationale for the Problem

For over a decade, legal educators (particularly clinical faculty) have argued for the importance of teaching empathy[54] as a critical component of legal education.[55] Both the Carnegie Report[56] and the Best Practices[57] study have emphasized that legal education's instruction in skills—including lawyer-client relationship skills—requires greater attention. While some might argue that empathy is a skill that cannot be taught outside the context of clinical representation of clients,[58] this problem proceeds from the assumption that empathetic understanding of the client's situation is a skill that can be addressed in a variety of settings. Indeed, if empathy is left unaddressed in the classroom, legal education may further the divide of mind and heart and leave students with a message that what they learn in the classroom is an intellectual exercise of little real relevance to what they will do as an attorney.[59]

Professional Responsibility courses are an especially appropriate classroom in which to address empathetic understanding of the client, as a key component in exploring the attorney-client relationship and the attorney's duty of communication. This role play is designed in the context of a bar admission problem. While the problem can be used to explore the substantive

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[54] See DAVID A. BINDER, PAUL BERGMAN & SUSAN C. PRICE, LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH 40 (1991) (citing Carl Rogers, in G. EGAN, THE SKILLED HELPER 87 (3d ed. 1986)):

> Empathy in its most fundamental sense ... involves understanding the experiences, behaviors, and feelings of others as they experience them. It means that [lawyers] must, to the best of their abilities, put aside their own biases, prejudices, and points of view in order to understand as clearly as possible the points of view of their clients. It means entering into the experience of clients in order to develop a feeling for their inner world and how they view both this inner world and the world of people and [events] around them

[55] Carrie Menkel-Meadow, *Narrowing the Gap by Narrowing the Field: What's Missing from the MacCrate Report - Of Skills, Legal Science and Being a Human Being,* 69 WASH. L. REV. 593, 620 (1994); Peter Margulies, *Reframing Empathy in Clinical Legal Education,* 5 CLIN. L. REV. 605 (1999); Marjorie A. Silver, *Emotional Intelligence and Legal Education*, 5 PSYCHOL. PUB. POL'Y & L. 1173, 1174 (1999); Laurel E. Fletcher & Harvey M. Weinstein, *When Students Lose Perspective: Clinical Supervision and the Management of Empathy*, 9 CLIN. L. REV.135 (2002); John E. Montgomery, *Incorporating Emotional Intelligence Concepts Into Legal Education: Strengthening The Professionalism Of Law Students*, 39 U. TOL. L. REV. 323 (2008).

[56] WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW: SUMMARY 6 (The Carnegie Found. for the Advancement of Teaching 2007).

[57] ROY STUCKEY, ET AL., BEST PRACTICES IN LEGAL EDUCATION: A VISION AND A ROAD MAP (2007), *available at* http://cleaweb.org/documents/Best_Practices_For_Legal_Education_7_x_10_pg_10_pt.pdf.

[58] Philip M. Genty, *Essay: Clients Don't Take Sabbaticals: The Indispensable In-House Clinic And The Teaching Of Empathy,* 7 CLINICAL L. REV. 273 (2000)

[59] Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1576-77 (1987):

> Failure to recognize the phenomenon of empathy explicitly in legal decisions more generally may result from a fear of the emotional realm as irrational, rather than arational. It may stem from a belief that the divide between "subject" and "object" is uncrossable. The resistance to empathy may be attributable to the adversarial ideology acquired during law school—understanding the adversary is not important unless it serves one's instrumental purpose—or to the fact that little in the professional culture and scholarship encourages development and use of empathic skills.

standards for admission to practice or the impact of law regarding disabilities on that process, the primary goal of this exercise is to explore how it feels to be a client. By placing the students in the role of a law student bar applicant—a situation that nearly every law student can imagine—the role play makes it easier for students to internalize the feelings and perspectives of the client.

This familiarity, however, can present problems. Be sure to let the students know that the problem is based on an actual reported case and is not based on any student in your law school. Let the students know that there are, however, likely to be students in the class who are facing bar admission issues—requests for disability accommodations, or other character and fitness challenges. Remind the students that, because of this likelihood, they should take special care to maintain a professional and respectful tone in their role plays and their discussion of the problem. Finally, suggest that the role play may raise uncomfortable issues for some students and that, if they need to discuss some of these issues, they may talk to you (or to the appropriate person in your school if you are not qualified or inclined to discuss bar applicant issues with students). This can also provide the opportunity to discuss with students the very real risks of over-identification with the client.[60]

Divide the class into "clients" and "attorneys." Let the students choose partners or assign students to partners. The problem can also be designed with three-person teams in which one person acts as an "observer" who should be directed to take notes on the interaction between attorney and client. Attorneys should be directed to read the chapter assignment carefully. Clients should be given the facts and instructions for role play, as well as a copy of the email and character and fitness application. Observers should also be given the client facts. If this will be the first experience in client interviewing for your students, you may want to supplement the assignment with some readings on client interviewing or active listening techniques.

Let the students know before you begin what the purpose of the exercise is. I provide the following outcome objective for the students.

> At the conclusion of this exercise, students should be able to interview a bar applicant to gain information necessary to identify character and fitness concerns and provide some basic counseling about how to best address those concerns. In particular, students should be able to identify at least three facilitators and three barriers to effective attorney-client communication and discuss how a client's emotions are relevant and important factors to identify and respect in the initial interview.

[60] Marjorie A. Silver, *Love, Hate, and Other Emotional Interference In The Lawyer/Client Relationship*, 6 CLINICAL L. REV. 259 (1999).

Conducting the Simulations

For general guidance on using simulations, see teaching techniques guidance in Part One of this manual. While one can assign the students to conduct the role play on their own time, I find the best results come from setting aside class time to actually conduct the role playing exercise. For a 50-minute class, the structure of the class would be:

5 minutes—Introduction—quickly remind students of learning objectives of exercise & give instructions regarding logistics. Reassure students that they are unlikely to "complete" their interviews, but that they should stop when time is up regardless of where they are in the process. To save time, I instruct the students to dispense with the introductory portions of the interview—discussions of fees, confidentiality, process, etc.—and simply begin with the client's story. I ask the students to suggest the question they might use to move to that portion of the interview. ("Tell me…" "How can I help you?" "What brings you here today?" etc.) I then direct the students to begin their role play.

20 minutes—Simulation—Students break into pairs and conduct their interviews. I allow students to move to designated areas outside the classroom (e.g., the hallway and student lounge) for the exercise, but instruct them that I need to know where they will be so that I can observe their interview. Walk around to each pair and listen. If students stop the interview in order to ask questions or talk about what is happening, turn their attention back to the role play, reminding them that no such opportunities generally are available in practice and that there will be time for discussion later. Jot down key observations. As the time gets close, give students a warning that the interviews will be about to end.

20 minutes—Discussion—Congratulate the students on their work. Give some general feedback on what you saw. Let them know that interviewing clients is not easy. Reflect on the degree to which some or all of the students have acquired the skills. Remind the students of core learning objectives.

Questions for discussion:

- Ask the clients "How did it feel to be a client?" Ask the attorneys "Were you aware of these feelings? What did you assume the client was feeling?"
- Ask the clients "What did your attorney do that helped facilitate communication?" (as students identify the good behaviors, supply some of the less helpful behaviors you may have observed. For example, if a student says "Jane was very non-judgmental" and gives examples, you might follow up with suggestions of what judgmental attorneys say and do and how that hurts communication) Ask the attorneys "What made this difficult?"
- Ask everyone "What was the client's problem?" Ask everyone "What are some solutions?"

Generally, students learn a lot from the simulation exercise about how to facilitate attorney-client communication: for example, how judgmental responses from attorneys shut them down; how attorneys who responded with legal analysis quickly and exclusively seemed cold and unhelpful; how a little expressed empathy facilitates rapport.

Additional questions depend on your additional learning objectives and time you wish to devote to the subject.

A second substantive objective could be to explore the boundaries of "good moral character" requirement of bar admission. Explain what happened in the actual case and ask for student reactions. The exercise generally leads to a debate concerning whether the client's contact with the board director, which did not violate any specific rule of procedure, was truly so improper that it implicated a character and fitness issue. The students really have to work to even identify the issue in the first place—many grab onto her switching her answer to the mental health question between application 1 & 2 as the real issue and don't even ask for a copy of the email. In the discussion of the problem after the interview, students should be pressed to clearly articulate precisely why the email to the director was wrong as a method of elucidating the murky grays of the "good moral character" requirement. One could expand this discussion with an exploration of whether this requirement is a good one for screening bar applicants.

Finally, one can use the problem to discuss the dangers of email as a communication medium for sensitive or emotional communications. How easy it is to press "send" without having reflected on the wisdom of communicating.

5 minutes—Closure—Congratulate students again on their work. Remind them of the key objectives of the lesson. Ask students to take one minute to write down the most important thing they learned from the exercise or the most pressing question they have (or both). Summarize their responses at the beginning of the next class or through electronic posting. Provide students citation to or a copy of the actual case upon which the problem is based. *In re Application of Head*, 867 N.E.2d 824 (Ohio 2007).

Instructions for Role Play—CONFIDENTIAL CLIENT FACTS

Your name is Pat Heart.

You began law school at Midwestern Central University Law School ("MCU") in August 2009 and graduated in May 2012. You graduated with a rank of 48 out of 150. Your GPA would be much higher, but your first year was terrible. You discovered during that year that you had had difficulty completing examinations within the time provided and that you had panic attacks in the classroom during testing. After your first-semester grades, you went to the university

counseling center and sought assistance. Tabatha K. Thompson, Ph.D., MCU's director of counseling services, counseled you, teaching you relaxation and visualization techniques. Nevertheless, during your spring Contracts exam, you suffered such a severe panic attack that you left the exam room and, with the permission of the associate dean, you called Dr. Thompson, who helped calm you down enough to finish the exam. Despite this help, your spring exam grades weren't much better and you were one-tenth of a point away from being dismissed. You continued to seek help from the counseling center and, in June 2004, a nurse at MCU's Student Health Center referred you to Dr. Debra A. Grayson. Grayson diagnosed you with generalized anxiety, and prescribed medication.

Dr. Thompson thought that you might also have a learning disorder, and she suggested that you see a specialist for an assessment. Thompson gave you a list of such specialists, which included Nancy R. Krasa, Ph.D. Over the summer of 2004, Krasa evaluated you by giving her a full range of intelligence, cognitive-functioning, and academic-achievement tests, and she discovered "distinct cognitive abnormalities" that possibly explained your inability to complete tests within the usual allowed time. She could not reach a precise diagnosis, however, and referred you back to your physician. Krasa also referred you to a reading specialist.

Your condition qualified you for special test-taking conditions under MCU's policy of accommodating students with disabilities. During your second and third years in law school, you took your exams in a room by yourself and you were given 50 percent more time than other students to complete your exams. With these accommodations, you were able to complete the exams without significant panic attacks. Your grades improved and you began to enjoy law school more. You were always prepared for class and actively participated in discussions. You got a job as a research assistant for Professor Stanley Stanton, your second-year civil-procedure professor, who recommended you for a clerkship with Baxter, Williams & Sarne, L.L.P. that spring. You clerked for that firm from January of your second year until the middle of your third year. During your third year, you became president of your law school fraternity and participated in a client counseling competition.

You applied on November 12, 2010 to register as a candidate for admission to the practice of law in the state of Central. You answered no to the question "Do you currently have any other condition or impairment * * * that in any way affects, or if left untreated might affect, your ability to practice law in a competent and professional manner?" You did not think that you had to disclose your learning disability because you were being treated for your condition and, even if you were not being treated, you believed that you could still practice law in a competent and professional manner.

You answered no to this question again on your March 31, 2012 application to take the bar examination. However, you did disclose your condition on the form for requesting special

accommodations to take the bar, which you submitted with your application to take the bar. You asked the Board of Bar Examiners to give you accommodations similar to those you had in law school when you took the bar exam. You submitted a report from Krasa and a report from Thompson describing your condition and the accommodations you had received in law school. In a May 17, 2012 letter, the Board of Bar Examiners denied your request, citing a special-accommodations consultant's determination that your condition did not satisfy the definition of disability in the Board of Bar Examiners Policy on Applicants with Disabilities. The letter also advised that you could appeal the denial to the board chairman within ten days, that that appeal would be "conducted on the basis of the record compiled before the Board," that you would be "limited to a written argument in support of your appeal," and that the chairman's decision would be final.

You were acquainted with the Chairman of the Board of Bar Examiners Terry P. Garrison through Garrison's spouse, attorney Jo Garrison. During your second year at MCU, Jo Garrison had supervised you in your work as a law clerk for Baxter, Williams & Sarne, L.L.P. Jo had become your friend and mentor, and Terry Garrison sometimes joined you for lunch or on other social occasions. After your clerkship ended, you maintained a friendship with the couple, especially with Jo.

You decided to appeal the Board of Bar Examiners' decision. You asked the special-program's officer for the Board of Bar Examiners how to prepare the appeal, he just said "read the rules and use your legal training." You also consulted Grayson, who wrote a brief synopsis of your medical condition for use in the appeal, and Thompson, who wrote a more detailed account of your condition and also explained the special accommodations that MCU had provided. In discussions with Thompson, you mentioned that you knew someone "involved in the bar examination process," and asked Thompson whether it would be inappropriate to contact that person. Thompson replied that she saw nothing wrong with you asking that person for guidance on what type of evidence you could submit with your appeal. You then decided to ask the Chairman of the Board of Bar Examiners, Terry Garrison, how to present your case.

On May 25, 2012, you sent an e-mail to Garrison asking for guidance in preparing the appeal. (If asked if you have a copy of that email, you may produce it; otherwise you can simply describe it in these terms) You introduced yourself by reminding Garrison that you had formerly served as a law clerk for his spouse. You then described the reasons you thought you needed the accommodations and the difficulty you had in knowing how to go about getting those accommodations for the bar exam. You made sure to let him know that you weren't asking for any 'favors' in how the appeal was decided. When you wrote this email, you never intended to influence Garrison's decision whether to grant your request for special accommodations. You were just desperate for some advice and assistance. However, it seems that Garrison considered the e-mail an attempt to take advantage of your acquaintance, and Garrison forwarded it

immediately to the secretary of the Board of Bar Examiners. The secretary appointed an acting chairman, and he later denied your appeal, foreclosing special accommodations.

You decided not to take the bar exam that June. Instead, you applied in August to take the February bar exam. On this application, you answered "yes" to the disability question and explained:

> I am currently being treated for a Central Processing Disorder and anxiety. * * *. If left untreated, I could still practice law in a competent and professional manner. However, it is my intention to practice law in a low key environment in order to minimize the anxiety, and to control my processing disorder, so that I will be an even stronger attorney as I practice law. I can function normally, I just have difficulty processing information and/or communications that are delivered rapidly, which is why I have significant problems with test taking. Even with my disorders, I can still practice law in a competent and professional manner.

The board of bar examiners has contacted you and indicated that they would like you to appear for a hearing, at which time they will be exploring whether you should be denied application to take the bar due to your previous failures to disclose your condition and because of your attempt to exert influence on Garrison.

You would like to know whether you should have an attorney accompany you to the hearing. Should you get witnesses?—you have many, many professors, fellow students, and attorneys who have agreed to write letters or testify on your behalf. What are the chances you will be able to take the bar?

Instructions for role play:

You should play yourself as a somewhat naïve, sincere individual. Don't overplay the role. Try to think of a situation in which you've had a lapse of judgment and remember what that felt like. (If you've never done anything stupid in your life, see me as I'd like to know your secret for success).

You should be prepared to admit that it was not really smart to email Garrison directly about your appeal, but you should express some confusion as to exactly why. For example, you might wonder if you would have gotten in as much trouble if you had asked his spouse for help. You might suggest that you have looked but you have never found a specific rule that prohibits contacting the bar examiners personally. Don't be too defensive, however, as you can, if pressed at all, see that referring to your personal relationship was not the right thing to do.

You should reflect some anger at Garrison for sending on the email—you think that Garrison could have simply sent back the email and let you know that discussing the matter with you was improper, but you assume he/she Garrison had to send on the email merely for self-protection. You should be anxious, worried and desperate to get a chance to take the bar. You want to do whatever is necessary to be able to take the bar. You wish there were some opportunity to get accommodations and are not very confident about your ability to pass without accommodations, but you realize there is almost no chance of getting accommodations at this point. Now your main goal is simply to get a crack at the bar exam. You would be willing to submit to psychological examination and even to delay taking the bar until July if necessary, but these should not be your suggestions.

Documents

You can produce your bar application character and fitness questionnaire and the email to Garrison at the meeting. (Note, if asked about the line in the email "I realize that you are the one who will be making this decision and I'm asking for any favors," you should explain that this was a typo—after all you wrote the email at 2:48 a.m.)

Here is the email:

From: Pat Heart [mailto:pat.heart@midwestcentral.edu]
Sent: Mon 3/263/2012 2:48 AM
To: Terry Garrison
Subject: Your help in bar application process please

Dear Terry,

I am a recent graduate of MCU law school. I think you probably remember me because I worked as a law clerk for Jo at Baxter, Williams & Sarne, for most of the past two years. You may remember that we went to the Access Justice fundraising dinner together. I am writing because I am desperate for some advice and assistance and I know you and Jo have always been so helpful to me in the past that you would be the person to turn to. I know that you are the person who decides the accommodations appeals and so can direct me in how to prepare a successful appeal.

I'm not sure where to begin. I applied for accommodations to take the upcoming bar exam and I just got the letter telling me that the accommodations have been denied because I haven't proven my case (I guess). Anyway I can bring an appeal, but no one at the board of bar examiners has told me exactly what I should put in an appeal.

I know that I need accommodations, but I didn't when I started law school. I did okay in undergrad without any special testing accommodations, but as an art major, I never had the kind of pressured exams that law school presents. I thought I was doing pretty well during the first semester—I kept up on all the reading and always briefed my cases—some of my friends were even borrowing notes from me because they thought my briefs were so good. I outlined all my classes pretty much and felt nervous but pretty confident going into the exams. I already knew that I would get a B+ in legal writing. But I knew I was in trouble after that first exam. It was the Criminal Law exam and I just panicked when I read the instructions for the multiple choice questions. It was one of those kind where one or more of the choices can be correct and you have to choose whether its only one or more. I just kept getting more and more nervous and thought I was going to pass out. I got through the multiple choice questions but I couldn't even begin to answer the essay. Anyway, I knew even before I got the grades that I had probably flunked out. In fact, I was surprised I did as well as I did given what a wreck I was taking the exams. I know lots of people get nervous during exams, but this was something entirely different. My brain just froze. I could hardly remember my own name, much less the law. . I ended up with a C in Property, a C- in Torts, a D+ in Criminal Law and a D in Constitutional Law, which was very close to putting me on probation. The exams in both Criminal Law and Constitutional Law were closed book, with about half the questions multiple choice.

Anyway, after my first-semester grades came in, I went to talk to the associate dean, who suggested I go to the counseling center on campus. I went there and met Dr. Tabatha K. Thompson. Dr. Thompson is the director of counseling services, and we talked quite a lot during the next semester. She told me I was suffering from text anxiety and gave me some exercises to learn to relax and not get panicked. The second semester didn't go much better though. My classes were okay, except for Contracts where the professor went so fast, I just couldn't keep up, but my study group shared notes and I felt prepared for that exam, as well as for the rest. The first exam (Torts II) went okay, but during the Contracts exam, I just froze. The exam was multiple choice for 2 hours and then 2 hours of a eight-page hypothetical. I got through the multiple choice part but as I began the essay, I was feeling so panicked I couldn't even think. I started to feel dizzy and nauseous. I left the exam room and the associate dean let me call Dr. Thompson, who helped calm me down enough to finish the exam. In the end, my spring exam grades weren't much better than the fall and I was still on the edge of academic dismissal. I kept working with Dr. Thompson and his staff, and that summer one of the nurses at the counseling center referred me to a psychiatrist, Dr. Debra A. Grayson.. Dr. Grayson said I had generalized anxiety, probably situational, and prescribed Buspar. I didn't really like taking it because it made me feel "off" all the time, but by the end of the summer I got used to it and it really seemed to help keep me calmer. But of course I wouldn't know whether it would help with the exams until that fall.

That summer, I also went to see Dr. Nancy R. Krasa, a specialist in learning disorders. She tested my sight and hearing and gave me a whole range of written and oral tests to assess my intelligence and achievement. My.Wechsler Adult Intelligence score showed that I have an IQ of 139, which Dr Krasa said indicates that I should be achieving much better in law school. She said that she discovered "distinct cognitive abnormalities" that possibly explained my inability to complete tests within the usual allowed time. She could not reach a precise diagnosis, however, and referred my back to my physician and to a reading specialist. I spent the entire summer working with all these specialists on reading, study and test-taking strategies designed to address my condition. I also asked for accommodations from MCU. Under their disabilities policy, they indicated that my condition qualified me for special test-taking conditions. During my second and third years in law school, I took all my exams in a room by myself and I was given time and a half for the exams. I didn't have any accommodations for take-home exams or papers because my doctors said that it was only the unique conditions of timed exams that caused me difficulty.

The last two years of law school convinced me that I would be a great lawyer. My grades got better, I was involved in many activities in law school and became a leader in the law school. At Jo's firm, I learned so much about the practice of law and got great reviews. As you know, the firm doesn't keep all its summer associates on as clerks during the school year, so the fact that they asked me back shows the high quality of work I did and the confidence they have in me. But before I can practice law, I have to be able to take the bar exam. When I applied for the same kind of accommodations I had been given in law school to take the bar exam, I was denied. I was hysterical when I got the letter denying accommodations. I cried for hours. All my hard work, not just in law school, but to learn about why testing was such a difficulty for me and all the extra work I had to do to deal with my condition. I couldn't believe that it all was for nothing. That my condition, which is all about timed exams, would stand in the way of my becoming a lawyer is just unbelievable! There aren't timed exams in the practice of law! I desperately need your help in preparing this appeal. I simply cannot function under the standard/normal testing conditions. I have not taken a test under standard conditions for 2 years—to start now would destroy me. All the hard work would be for nothing. I would be a great lawyer. I realize that you are the one who will be making this decision and I'm asking for any favors, I am just hoping that you will understand how important these accommodations are to be able to allow me to demonstrate what I know. I am <u>not</u> stupid! Ask my professors. Ask all my classmates who borrowed my notes and who I helped prepare for exams and who ended up with better grades than me because they don't have panic attacks during exams. You can ask Jo about my character. Jo has personally watched me transition through school as a very scared, frustrated and academically challenged student, to a more confident student, but only after accommodations were made. I am not asking for any special advantage, just a level playing field. Without my testing accommodations, I can't see how I can begin to approach a two-day, time pressured, exam. I will end up in the hospital! Please, <u>please</u> help me know what I need to do to successfully appeal this decision! You and Jo have been such kind and helpful mentors to me, I know you can point me in the right direction. Thank you.

APPLICATION TO THE BAR OF CENTRAL

Name Patricia Jane Heart 000-00-0000
First Middle Last Social Security Number*

APPLYING AS (choose one category):

□ Law Student Registrant (See Fee Schedule Description) □ In-House Counsel
□ Motion/Reciprocity Applicant □ Notary Public
☒ Bar Examination Applicant (exam date Feb. 2013) □ Foreign Legal Consultant

List below all the other names or surnames you have used or been known by and describe when, how, and why your name was changed (e.g., marriage or divorce).

■ First, Middle, Last Name
From Year_____ To Year_____
Reason for change

■ First, Middle, Last Name
From Year_____ To Year_____
Reason for change

Sex: □ Male ☒ Female Date of birth: January 1, 1986

Place of birth: Smalltown, Central, USA

Of what country are you a citizen? US
If you are not a citizen of the United States, what is your immigration status?
Telephone numbers and e-mail address at which you can be reached during the next six months:

816-235-2380 (Home) pat.heart@yahoo.com

Mailing address at which you can be contacted about this application during the next six months:
500 East Main Street
Everycity, Central

Check if address is ☒ Residence or □ Business
If business, name of firm
Address/P.O. Box
City State Zip Code
Country

1. List every permanent and temporary street address where you have lived:

- If this is your first application prior to bar admission, provide your residency information for the last ten years or since age 18, **whichever period of time is longer**; OR
- If you have previously applied for bar admission or registered as a law student with a bar admitting authority, provide your residency information for the last ten years or since you were first admitted to the bar in any jurisdiction, **whichever period of time is longer.**

List addresses in reverse chronological order starting with your current address.

Current Address From Mo/Yr August 2009-
Address 100 Maple Street, Apt 3N
City County State Zip Everycity, Central 00000
Country if not the United States

■
From Mo/Yr To Mo/Yr 2005-2009
Address 1000 Bendwood Dr, Apt 8D
City County State Zip Anothercity, Central 00000
Country if not the United States

■
From Mo/Yr To Mo/Yr 2004-05
Address University of Central, Ivy Residence Hall
City County State Zip Anothercity, Central 00000
Country if not the United States

■
From Mo/Yr To Mo/Yr 1986-2004
Address 516 Brown Street
City County State Zip Smalltown, Central 00000
Country if not the United States

■
From Mo/Yr To Mo/Yr
Address
City County State Zip
Country if not the United States

■
From Mo/Yr To Mo/Yr
Address
City County State Zip
Country if not the United States

EDUCATIONAL INFORMATION

2. List the names of all the colleges and universities you attended. Do not include law schools. Include location (including the name of the campus if the school had more than one), dates attended, and degree(s) received. Mark ND if you did not receive a degree. If the school's name has changed since your attendance, provide both its current name and former name. List schools beginning with the one most recently attended.

College	University of Central	
City State	Anothercity, Central	
Country/Province	USA	
From Mo/Yr To Mo/Yr Degree	2004-2009	BFA

3. List the names of all the law schools you have attended or are currently attending. Include location (including the name of the campus if the school had more than one), dates attended, degree(s) received or expected to be received, and date degree(s) expected, if applicable. Mark ND if you did not receive a degree. If the school's name has changed since your attendance, provide both its current name and former name. List schools beginning with the one most recently attended.

Law School	Midwestern Central University
City State	Everycity, Central
Country/Province	USA
From Mo/Yr To Mo/Yr Degree Date	8/2009-6/2012 J.D.

4. Did you engage in law office study in lieu of receiving a JD? (This is permitted only in certain jurisdictions.) □ Yes ☒ No
If yes, under the approval of what jurisdiction?
Indicate when and where: From Mo/Yr To Mo/Yr
Name of Firm
Proctor
Firm Address
City State Zip

5. Have you ever been dropped, suspended, warned, placed on scholastic or disciplinary probation, expelled, requested to resign, allowed to resign in lieu of discipline from any college or university (including law school), or otherwise subjected to discipline by any such institution or requested or advised by any such institution to discontinue your studies therein? □ Yes ☒ No
If you answered yes, provide the following information:
Name of the Institution

Type of Action Date Action Taken
Explanation of Institution Action

ADMISSION INFORMATION
6. PRIOR APPLICATIONS FOR ADMISSION

List **every** state or foreign country to which you have submitted an application to take a bar examination or an application to be admitted to the bar by examination, motion, or diploma privilege. List every state or foreign country to which you have submitted an application to be reinstated to the bar. Include any preregistration as a law student. Do not list multiple application dates and examination dates in the same field; multiple applications and examinations to the same state or foreign country require separate entries. Provide a brief narrative explanation of the circumstances surrounding the reason for any withdrawals of applications or failures to be admitted (other than those due to failing the examination).

In response to this question, DO NOT include information regarding admission to the U.S. federal courts or authorizations to appear pro hac vice.
If admitted to a bar of a foreign country, indicate the name and address of the admitting authority in the explanation field

□ NONE: This is my first application for admission to practice law.

State or foreign country Central
Applied as: □ Bar Examinee □ Motion/Reciprocity □ Diploma □ Reinstatement ☒ Law Student Registrant
Not admitted due to: □ Failed exam ☒ Withdrew application □ Other reason □ Pending
Date application made (Mo/Yr) November 2009
Date examination taken (Mo/Yr) N/A
Admitted or readmitted (Mo/Day/Yr) Bar Number*
Explanation

State or foreign country
Applied as: ☒ Bar Examinee □ Motion/Reciprocity □ Diploma □ Reinstatement □ Law Student Registrant
Not admitted due to: □ Failed exam ☒ Withdrew application □ Other reason □ Pending
Date application made (Mo/Yr) March 2012
Date examination taken (Mo/Yr)
Admitted or readmitted (Mo/Day/Yr) Bar Number*
Explanation

7. List every job you have held:

- If this is your first application prior to bar admission, provide your employment information for the last ten years or since age 18, **whichever period of time is shorter.**
- If you have previously applied for bar admission or registered as a law student with a bar admitting authority, provide your employment information for the last ten years or since you were first admitted to the bar in any jurisdiction, **whichever period of time is longer.**

All law-related employment must be listed.

Follow these instructions:

□□List most recent employment first.

□□Include self-employment, externships, internships (paid and unpaid), clerkships, and military service.

□□Include part-time employment.

□□Include temporary employment. If you were employed by a temporary agency, provide the name, mailing address, and telephone number of the temporary agency and also note the name of the firm/company to which you were assigned.

□□Account for any period of time when you were unemployed for more than three months (i.e., in school, studying for the bar examination, seeking employment, performing volunteer work, etc.). For these periods of time, **check the box for Unemployment and describe the reason for your unemployment in the field labeled Position.**

□□Do not furnish your own name or the name of someone to whom you are related by blood or marriage as a confirming reference.

□□CURRENT EMPLOYMENT
From June 2010 To PRESENT
Position Clerk
Employer or Firm Midwestern Central University Law Library
Supervisor/Associate Marian Librarian
Employer or Firm Address Midwestern Central University Law Library
1 College Drive
City State Zip Telephone ( ) Everycity, Central, 00000 816-235-8400
Country if not the United States USA
E-mail mlibrarian@mculaw.edu

From Mo/Yr To Mo/Yr January 2012-June 2012 ☒ Unemployment Period
Reason: Completing law school

□□
From Mo/Yr To Mo/Yr January 2011-January 2012
Position Law Clerk

Employer or Firm Baxter, Williams & Sarne, L.L.P.
Supervisor/Associate Jo Garrison
Employer or Firm Address 1500 West Avenue
City State Zip Telephone ( ) Everycity, Central 0000 809-908-9999
Country if not the United States
E-mail garrisonj@BWSLAW.COM

□□

From Mo/Yr To Mo/Yr September 2011-January 2011
Position Research Assistant
Employer or Firm Professor Stanley Stanton
Supervisor/Associate Stanley Stanton
Employer or Firm Address MCU Law School
1 College Drive
City State Zip Telephone ( ) Everycity, Central 0000 809-908-9999
Country if not the United States
E-mail sstanton@mculaw.edu

□□

From Mo/Yr To Mo/Yr August 2009-September 2010 ☒ Unemployment Period
Reason: First year of law school (volunteered at Legal Aid of Central during summer)

□□

From Mo/Yr To Mo/Yr September 2005 -August 2009
Position Gallery associate
Employer or Firm Fireworks Pottery Studio and Galleries
Supervisor/Associate Clay Molding
Employer or Firm Address 709 Main Street
City State Zip Telephone ( ) Anothercity, Central 0000 809-908-9999
Country if not the United States
E-mail firedclay@fireworksclay.com

From Mo/Yr To Mo/Yr prior to September 2005 ☒ Unemployment Period
Reason: Finishing high school and starting college

EMPLOYMENT AND PROFESSIONAL INFORMATION

8. Have you ever been terminated, suspended, disciplined, or permitted to resign in lieu of termination from any job? (If the employment was not previously listed, please go back and add it to Item 7.) □ Yes ☒ No

If yes, provide the following about each occurrence:

Employer or Firm
Dates of Employment: From Mo/Yr To Mo/Yr
Disposition: □ Terminated □ Suspended □ Disciplined □ Permitted to resign
Explanation of circumstances:

9. List the full name and address of each mandatory or voluntary bar association of which you have been or are currently a member.
☒ Check here if you have never been a member.
Name of Bar Association
Dates of Membership: From Mo/Yr To Mo/Yr
Address
City State Zip

10. A. Have you ever been disbarred, suspended, censured, or otherwise reprimanded or disqualified as an attorney?
□Yes ☒ No

B. Have you ever been the subject of any charges, complaints, or grievances (formal or informal) concerning your conduct as an attorney, including any now pending? □ Yes ☒ No
☒ Check here if you have never been admitted to practice law.
If you answered yes to 10A and/or 10B, please provide the following information for each matter:
Name of Regulatory Agency
Address
City State Zip
Agency Action Date
Explanation

CHARACTER AND FITNESS INFORMATION
11. Have you ever been the subject of any charges, complaints, or grievances (formal or informal) alleging that you engaged in the unauthorized practice of law, including any now pending? □ Yes ☒ No
If the answer is yes, please provide the following information for each matter:
Name of Regulatory Agency
Address
City State Zip
Agency Action Date
Explanation

12. Have sanctions ever been entered against you, or have you ever been disqualified from participating in any case? □ Yes ☒ No

☒ Check here if you have never been admitted to practice law. If the answer is yes, please provide the following for each sanction or disqualification:
Case No. Style of Action
Name of Court
Address
City State Zip
Disqualified from Mo/Yr To Mo/Yr
Reason for the sanction or disqualification
Attach a copy of the order of sanction or disqualification.

13. Have you ever been a member of the armed forces of the United States, its reserve components, or the National Guard? □ Yes ☒ No
If yes, complete FORM 1.

14. Have you ever held judicial office? □ Yes ☒ No
If yes, provide the following information about each office:
Office held From Mo/Yr To Mo/Yr
Name of Court
Address
City State Zip
Reason for termination, if applicable

15. Have you ever applied for a license (even if the application was subsequently withdrawn) or held a license for a business, trade, or profession, other than as an attorney-at-law?
□ Yes ☒ No
If yes, provide the following information about each license:
Type of License Mo/Yr
Current Status of License
License Number (if applicable)
Issuing Authority
Address
City State Zip

16. A. Have you ever been denied a license for business, trade, or profession (e.g., CPA, real estate broker, physician, patent practitioner)? □ Yes ☒ No

B. Have you ever had a business, trade, or professional license revoked? □ Yes ☒ No
If you answered yes to 16A and/or 16B, please provide the following information for each denial or revocation:
Name of Regulatory Agency

Address
City State Zip
Agency Action Date
Explanation

17. A. Have you ever been suspended, censured, or otherwise reprimanded or disqualified as a member of another profession, or as a holder of public office? □ Yes ☒ No

B. Have you ever been the subject of any charges, complaints, or grievances (formal or informal) concerning your conduct as a member of any other profession, or as a holder of public office, including any now pending? □ Yes ☒ No
If you answered yes to 17A and/or 17B, please provide the following information for each matter:
Name of Regulatory Agency
Address
City State Zip
Agency Action Date
Explanation

18. Has any surety on any bond on which you were the principal been required to pay any money on your behalf?
□ Yes ☒ No
If yes, complete **FORM 2.**

19. Have you ever been a named party to any civil action? □ Yes ☒ No
NOTE: Family law matters (including continuing orders for child support) should be included here.
If yes, complete a separate **FORM 3** for each action. Attach a copy of the pleadings and final disposition.

20. Have you ever had a complaint or action (including, but not limited to, allegations of fraud, deceit, misrepresentation, forgery, legal malpractice) initiated against you in any administrative forum? □ Yes ☒ No
If yes, complete a separate **FORM 3A** for each complaint or action.

21. A. Have you ever been cited for, arrested for, charged with, or convicted of any alcohol- or drug-related traffic violation other than a violation that was resolved in juvenile court? □ Yes ☒ No
If yes, complete a separate **FORM 5** for each incident.

B. Have you been cited for, arrested for, charged with, or convicted of any moving traffic violation during the past ten years? (Omit parking violations.) □ Yes ☒ No
If yes, report each incident on **FORM 5T**.
NOTE: Your responses to Questions 21A and/or 21B must include matters that have been dismissed, expunged, subject to a diversion or deferred prosecution program, or otherwise set aside.

22. Have you ever been cited for, arrested for, charged with, or convicted of any violation of any law other than a case that was resolved in juvenile court? (Report traffic violations at Questions 21.)
□ Yes ☒ No
If yes, complete a separate **FORM 5** for each incident.
NOTE: Include matters that have been dismissed, expunged, subject to a diversion or deferred prosecution program, or otherwise set aside.

23. Have you ever filed a petition for bankruptcy? □ Yes ☒ No
If yes, complete a separate **FORM 4** for each bankruptcy.

24. A. Have you had any debts of $500 or more (including credit cards, charge accounts, and student loans) which have been more than 90 days past due within the past three years?
□ Yes ☒ No
B. Have you ever had a credit card or charge account revoked? □ Yes ☒ No
C. Have you ever defaulted on any student loan? □ Yes ☒ No
D. Have you ever defaulted on any other debt? □ Yes ☒ No
If yes to Questions 24A, 24B, 24C, and/or 24D, complete a separate **FORM 6** for each debt.

PREAMBLE TO QUESTIONS 25, 26, and 27
Through this application, the National Conference of Bar Examiners makes inquiry about recent mental health and addiction matters. This information, along with all other information, is treated confidentially by the National Conference and will be disclosed only to the jurisdiction(s) to which a report is submitted. The purpose of such inquiries is to determine the current fitness of an applicant to practice law. The mere fact of treatment for mental health problems or addictions is not, in itself, a basis on which an applicant is ordinarily denied admission in most jurisdictions, and boards of bar examiners routinely certify for admission individuals who have demonstrated personal responsibility and maturity in dealing with mental health and addiction issues. The National Conference encourages applicants who may benefit from treatment to seek it.

Boards do, on occasion, deny certification to applicants whose ability to function is impaired in a manner relevant to the practice of law at the time that the licensing decision is made, or to applicants who demonstrate a lack of candor by their responses. This is consistent

with the public purpose that underlies the licensing responsibilities assigned to bar admission agencies; further, the responsibility for demonstrating qualification to practice law is ordinarily assigned to the applicant in most jurisdictions.

The National Conference does not ordinarily seek medical records, although the jurisdiction in which the applicant is seeking admission may do so.

The National Conference does not, by its questions, seek information that is fairly characterized as situational counseling. Examples of situational counseling include stress counseling, domestic counseling, grief counseling, and counseling for eating or sleeping disorders. Generally, the National Conference and the various boards of bar examiners do not view these types of counseling as germane to the issue of whether an applicant is qualified to practice law.

25. Within the last five years, have you been diagnosed with or have you been treated for bipolar disorder, schizophrenia, paranoia, or any other psychotic disorder? □ Yes ☒ No
If you answered yes, complete **FORMS 7** & **8**. Duplicate **FORMS 7** & **8** as needed.

26. A. Do you currently have any condition or impairment (including, but not limited to, substance abuse, alcohol abuse, or a mental, emotional or nervous disorder or condition) which in any way currently affects, or if untreated could affect, your ability to practice law in a competent and professional manner? ☒ Yes □ No
B. If your answer to Question 26(A) is yes, are the limitations caused by your mental health condition or substance abuse problem reduced or ameliorated because you receive ongoing treatment (with or without medication) or because you participate in a monitoring program? ☒ Yes □ No
If your answer to Question 26(A) or (B) is yes, complete **FORMS 7** & **8**. Duplicate **FORMS 7** & **8** as needed. As used in Question 26, "currently" means recently enough so that the condition could reasonably have an impact on your ability to function as a lawyer.

27. Within the past five years, have you ever raised the issue of consumption of drugs or alcohol or the issue of a mental, emotional, nervous, or behavioral disorder or condition as a defense, mitigation, or explanation for your actions in the course of any administrative or judicial proceeding or investigation; any inquiry or other proceeding; or any proposed termination by an educational institution, employer, government agency, professional organization, or licensing authority?
□ Yes ☒ No
If you answered yes, furnish a thorough explanation below:
Name of Entity before which the issue was raised (i.e., court, agency, etc.)
Address

City State Zip Telephone ( )
Nature of the Proceeding
Date of Disposition
Disposition
Explanation

ACKNOWLEDGMENT OF COMPLETE APPLICATION

I have read the foregoing document and have answered all questions fully and frankly. The answers are complete and true to the best of my knowledge. I have not modified the questions in any respect, and I understand that should they be modified, work on my application by NCBE will be terminated and any fees paid to NCBE will be forfeited. I understand that I should update my application during its pendency and that failure to do so may result in delays in its processing.

STATE OF_____
COUNTY OF_____
Signature of Applicant
Subscribed and sworn to or affirmed before me this _____ day of ,
Month Year
Notary Public
My commission expires
Seal or stamp must be affixed to each original.

Attach **three original notarized copies** of the Authorization and Release Form.

DO NOT ALTER THESE FORMS
Execute Three Original Copies
Please Use Black or Blue Ink

AUTHORIZATION AND RELEASE

I, Patricia Jane Heart, born at Smalltown, Central, USA, on January 1, 1986, having filed an application with the admission authority of the bar of Central as one of the following: Law Student Registrant, Motion/Reciprocity Applicant, Bar Examination Applicant, In-House Counsel, Notary Public, or Foreign Legal Consultant, hereby apply for a character report to be prepared by the National Conference of Bar Examiners. I further consent to the National Conference of Bar Examiners conducting an investigation as to my moral character, professional reputation, and fitness for the practice of law. I further agree to provide additional information which may be required concerning my past record. I understand that the contents of my character report are confidential and shall be reported only to bar admissions authorities for the purpose of making a determination regarding my character and fitness to practice law.

I also authorize and request every person, firm, company, corporation, association, court, school, college, university, other educational institution, governmental agency, law enforcement agency, and any other agency having control of any records, files, documents, writings or other information pertaining to me to furnish to the National Conference of Bar Examiners any such information regarding any and all (including those dismissed or otherwise erased or expunged by law, whether formal or informal, pending or closed) charges, complaints, disciplinary actions, grievances, sanctions, suspensions, reprimands, disqualifications, censures, resignations, terminations, citations, arrests, indictments, convictions, judgments, court-martials, non-judicial punishments, administrative discharges, or any other pertinent data or information pertaining to me. I further authorize the National Conference of Bar Examiners or any of its agents or representatives to inspect and make copies of such documents, records, or other information. The records, however, will not include any information with respect to a juvenile offense.

I authorize the National Personnel Records Center in St. Louis, MO, or other custodian of my military record to release to the National Conference of Bar Examiners information or photocopies from my military record.

I hereby release, discharge, and exonerate the National Conference of Bar Examiners, its agents and representatives, the admitting authority of the above jurisdiction, its agents and representatives, and any person so furnishing information from any and all liability of every nature and kind arising out of the furnishing or inspection of such documents, records, and other information, or the investigation made by the National Conference of Bar Examiners or by the admitting authority.

STATE OF CENTRAL
COUNTY OF WHERE

Signature of Applicant: Patricia Jane Heart

Subscribed and sworn to or affirmed before me this 5th day of August, 2007

Notary Public: Sam Signer

My commission expires 1/1/2015

Seal or stamp must be affixed to each original.

Signature of Applicant

To be used with Questions 25 and 26:

FORM 7 / AUTHORIZATION TO RELEASE MEDICAL RECORDS

Upon presentation of the original or a photocopy of this signed authorization, I (Applicant's Name) Pat Heart authorize (Name of Institution, Doctor, or Counselor Address) Nancy R. Krasa, Ph.D (City State Zip) Everycity, Central to provide information, including copies of records, concerning advice, care, or treatment provided to me, without limitation relating to mental illness or the use of drugs or alcohol, to representatives of the National Conference of Bar Examiners who are involved in conducting an investigation into my moral character, professional reputation, and fitness for the practice of law. I understand that any such information as may be received will be reported only to the admitting authority.

I hereby release, discharge and exonerate the National Conference of Bar Examiners, its agent and representatives, the admitting authority, its agent and representatives, and (Name of Institution, Doctor, or Counselor) Nancy R. Krasa, Ph.D, their agents and representatives so furnishing information from any and all liability of every nature and kind arising out of the furnishing or inspection of such documents, records and other information, or the investigation made by the National Conference of Bar Examiners or the admitting authority.

Signature of Applicant Patricia Jane Heart

Subscribed and sworn to or affirmed before me this 5th day of August, 2012

Notary Public Sam Signer

My commission expires 1/1/15

Seal or stamp must be affixed to each original.

The National Conference of Bar Examiners is aware of your obligations under HIPAA.

To be used with Questions 25 and 26:

FORM 8 / DESCRIPTION OF MENTAL HEALTH OR SUBSTANCE ABUSE CONDITION OR IMPAIRMENT

Name: Patricia Jane Heart 000-00-0000
Dates of treatment: From Mo/Yr To Mo/Yr: June 2010 - date
Name and complete address of attending physician or counselor: Nancy R. Krasa, Ph.D
Physician's or Counselor's current address 2099 Professional Bldg
City State Zip Everycity, Central
Telephone: 880-809-0999
Name and complete address of hospital or institution:
Name of hospital or institution
Hospital's or Institution's current address
City State Zip
Telephone ( )
Describe the condition or problem: I am currently being treated for: a Central Processing Disorder and anxiety, more specifically test anxiety. If untreated, I could still practice law in a competent and professional manner. However, it is my intention to practice law in a low-key environment in order to minimize the anxiety, and to control my processing disorder, so that I will be an even stronger attorney as I practice law. I can function normally, I just have difficulty processing information and/or communications that are delivered rapidly; which is why I have significant problems with test taking. Even with my disorders, I can still practice law in a competent and professional manner.

Describe any treatment and/or monitoring program : Buspar and talk therapy

The National Conference of Bar Examiners is aware of your obligations under HIPAA.

Appendix D: Using Team Based Learning

For over ten years now, I have been teaching this course on a regular basis using the team-based learning (TBL) teaching strategy. Providing students guidance and opportunities for teaching one another is an extremely effective method for raising the expectations for the entire class as well providing a supportive climate. When peers interact in learning there tends to be both a cognitive and an affective difference in the approach to the process by both participants. [61] Hierarchies are broken down and learners view the relationship as a collaborative learning experience. There is a greater likelihood of both empathic response and freedom from constraining deference that frees students to push the limits of their learning.[62]

If you have not used TBL previously, you will benefit significantly by reading more about the method and planning carefully before using this strategy, as it is not a teaching method you use for one or two classes but a comprehensive strategy for course design.

Some of the essential materials you will need for applying this strategy are included here: a syllabus explanation, a detailed explanation of the first class, a description of the TBL cycle, and guidance on using peer evaluations.

TBL Tool #1 : Explaining TBL in the Syllabus

Sample Syllabus Explanation of Team Based Learning:

Teaching methodology for this course

Collaboration is an important skill for knowledge workers in general, including attorneys. In this course you will be working with your colleagues at regular intervals. I use a team-based learning (TBL) approach to teaching this course. TBL is used in colleges and professional schools around the country and has been studied extensively. The research shows it improves student learning, not only about the subject matter but also about how to form effective teams among knowledge workers (lawyers, doctors, architects, etc.). TBL also prepares you for law practice. Research has shown that, across all disciplines, the ability to work well with others is more important to success than intellectual expertise.

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[61] NEAL A. WHITMAN, PEER TEACHING : TO TEACH IS TO LEARN TWICE 14 (ASHE-ERIC Higher Education Report No. 4 1988).

[62] *Glesner Fines, Competition and the Curve*, supra note at 913; *Vernellia R. Randall, Increasing Retention And Improving Performance: Practical Advice On Using Cooperative Learning In Law Schools,* 16 T.M. COOLEY L. REV. 201, 213 (1999).

The Firms:

During the first class, I will assign you to diverse "law firms" of 5-7 students; these firms will work together the entire semester. You will be responsible for holding each other accountable to making the team work effectively. I will ask you during the first class to design thoughtful contribution guidelines and then discuss the guidelines with your team periodically. If you have problems with your firm, I will ask you to work it out. The biggest reason that teams don't function effectively is because team members avoid conflict. You may have addressed conflicts between teammates effectively in your previous work, service, academic, and extracurricular experiences. Address the issue with your team as you would in a professional office. Consider how you would want to hear the message if your behavior was a challenge for your teammates. What would be effective? If the problem is not resolved using the team contribution guidelines, talk to me, and I can suggest ways for you and your teammates to work through the problem. In the rare case of alleged student misconduct, I will likely intervene.

How Class Works:

Unlike traditional classes, in which I would use class time to review basic information and explore some issues in discussions or occasional group work, in TBL, most our classes will involve you working within your law firm, using the course materials to solve problems and make decisions together. The course is divided into seven units. To prepare for each unit, you will read the assigned text materials, including the relevant rules of professional conduct, to master the material in that assignment.

Quiz:

You will then be tested individually on your understanding with a closed-book quiz. These quizzes count toward your individual grade for the course. In class, your firm will take the quiz together and be graded immediately, with the score counting toward your firm grade. In well-functioning law firms, the team usually outperforms the highest scoring individual team member. That's because you will be bringing to bear all the intellectual resources of the group and the deeper learning that comes from debate and discussion as you work together on your answers.

Appeals:

You will then have an opportunity to appeal any questions for which you believe I have made a mistake in my choice of the answer, or in making the question clear, or in providing sufficient or clear reading materials that it would be fair for you to answer the question. Appeals are for the purpose of furthering your understanding of the materials and balancing any unfairness in the quiz process. An appeal must have written support. An appeal is granted if it demonstrates that your firm understood the concept(s) but missed the question anyway or that your confusion was due to ambiguity in the reading material. As a result:

• If the appeal is based on ambiguity in the question, you should:
1. Identify the source of ambiguity in the question and,
2. Offer an alternative wording that would have helped you to avoid the problem.

• If the appeal is based on either inadequacies in the reading material or disagreement with our answer, you should:
1. State the reason(s) for disagreeing with our answer and,
2. Provide specific references from the reading material to support your point of view.

When an appeal is accepted on a question that a group has missed (no individual appeals will be accepted): It "counts" i.e., the points missed will be added to their group score and the score of any individual in the group who answered the same way the group did. Only those groups that appeal may add the additional points. Group member(s) who had the original correct answer will continue to receive credit on the question.

Application Activities:

Following each quiz and appeal, we will then have a series of one or more activities that allow you to actively engage in the material. You will be assigned materials to prepare for class individually but will work together on the activities during class. I will try to minimize as much as possible the amount of time you must spend meeting outside of class. I will give you feedback on these activities but most will not be graded, since they are designed to practice application of the knowledge you have demonstrated in the quiz.

Administrative Guidelines:

Your firm will have a folder in which you will have a copy of your firm's operating principles, you will keep track of your attendance, and your scores (individually and as a group) on quizzes and your firm scores on application problems. Before class begins, a member of your firm should pick up the folder. Each of you is responsible for initialing the attendance sheet in the folder and reviewing any graded assignments together. Work for a given class period will also be distributed through the folders.

Grade Calculation:

Your final grade will be determined based on a combination (to be negotiated in class) of the following:[63]

- Your individual scores on quizzes and other preparatory assignments for class
- Your individual scores on a final project, for which you can receive critique from your firm before submitting the final product
- Your group score on quizzes and on three of the application activities.

[63] You can indicate minimums or maximums for each of these if you wish or your law school has policies limiting the use of group grade assessment.

- Your score on a peer assessment of your contributions to the group.

Assignments and calendar of learning activities

Text assignments are for reading and study only. You will not be responsible for completing any of the problems or assignments in the text unless specifically assigned.

Items marked with a * will be graded assignments and activities.

Team-Based Learning Cycle

Phase 1 **Out of Class**	**Phase 2** **Readiness-Assurance** **In-class (1-2 classes)**				**Phase 3** **Application of Course Concepts (3-6 classes)**
Individual Study of Course Content	**Individual Test**	**Team Test**	**Team Appeals**	**Instructor Feedback**	**Small Group Assignments**

The First Class

During the first class I arrange groups, have the students negotiate grade weights, take a quiz on the syllabus, and begin to set their firm's ground rules.

On the first day of class, I have written on the board "BE PREPARED TO MOVE TO A DIFFERENT SEAT" so students do not settle in. I have students calculate a number through a short questionnaire that causes the students to be distributed according to experience in law practice and area of law in which they desire to practice. I do this during the class so that the method of assign them to their law firms is visible and random. I then have each firm choose where they will sit together in the classroom (I have pre-marked seat groupings to maximize this process).

I give the first students "selection cards" (See example below) as they enter the classroom until I have distributed enough selection cards for the number of firms I will form. Before class, I have solicited students for the need for any particular seating in the classroom (for example, someone who needs to leave the classroom periodically for medical reasons would want to have his or her group sit near the door) and I give those students a "selection card" that gives them priority in choosing seating for their firm.

> Congratulations, you have been selected as your law firm's managing partner for this first class.
>
> You are firm # ____.
>
> When you have gathered your firm, choose the groups of seats where your firm would like to sit (designated by colors on the seating chart). When your firm is called, take your seats. Please do not rearrange the grouping of seating. Seating groups are arranged for maximum ability to work as a group and accommodate all groups in the classroom.

Because I teach in a traditional classroom with tiered and fixed seating (probably the worst setting for team-based learning!), I also give this student a copy of the seating chart with groups color-coded and outlined. This insures that students sit together in a formation that allows them to work together and all be heard.

For best results in forming groups, use a method that is visible to all students and generates a roughly random division. I have formed groups based on expressed interest in practice areas in the past, but have not found that as effective for the class as a whole as using a more visible and random method. If you want to divide experience or expertise among the groups, have the students take a short "quiz" in which they give themselves "points" for experience. In my professional responsibility class, I have arrived at the following for distributing students into groups according to their area of interest as well as their experience.

SURVEY: Give yourself 1 point for being here. Then add:

A. If you have practiced law (either as an attorney or as a Rule 13 student), give yourself 2 points for each semester of practice (up to 10 points)

B. If you have taken and passed the MPRE course give yourself 2 points

C. If you are in your third year of law school, give yourself 2, points.

D. If you are interested in representing entities (corporations, governments, organizations) rather than individuals, give yourself 20 points.

E. If you are primarily interested in practicing criminal law (defense or prosecution), give yourself 40 points.

Add your points and arrange yourselves in a line from 1 to 76. If someone has the same points as you, arrange yourself alphabetically by first name from A to Z. Count off (to create firms of 5 to 7 members). So, for example, in my class of 72 students, I will have the students count off 1 through 12 for firms of six students each. I give the first student a large colorful sign with the number of their firm and tell them to spread out and find their firm. I sometimes assign seating to the firms, depending on the classroom setup.

ASSIGNMENT: Forming Your Firm

Introduce yourselves to one another and exchange contact information
Share with one another what you want to get out of the course
Print your names neatly on the firm folder attendance sheet
As a firm, complete the quiz in your folder.

Each firm has a hanging file folder. Affixed to the inside of the folder is an attendance sheet with the names of each student in the firm and the dates of all the classes. Students maintain attendance by initialing this sheet each class. This gives the students and me a record of student attendance. On the other side of the folder I insert a sheet with all the activities and the possible scores for each. I have the students put their names in their firm folder and introduce one another briefly.

Negotiate Grade Weights

Elect a representative from your group to negotiate on your behalf.

<u>Assessment: Quiz</u>

I then give each firm a quiz over the syllabus and the reading materials. This is the first of what TBL methods refer to as "readiness assessment tests." Readiness assessment tests communicate to the students that they are expected to come to class fully prepared and having mastered the material as fully as possible.

Quizzes should be focused on the objectives for the course and limited in number to allow for complete discussion. Multiple choice or true/false questions force the team to select one answer and thus force discussion and debate. Strive for questions that require analysis and challenge the students to demonstrate their understanding rather than mere rote knowledge.

The methods for each of these tests is as follows:

1. Introduce the quiz method. Explain that the purpose of this process is to ensure that all students understand the material so that the class time can be used for productive examination of practical applications. Each student takes the quiz individually (either in class or before class online) Particularly where questions include fairly elaborate hypotheticals, providing the quiz before class allows class time to be spent on discussion and debate rather than reading the quiz. The disadvantage of providing the entire quiz before class is that students may simply prepare the quiz and not study beyond that necessary to answer the specific questions. A middle ground is to provide the hypotheticals but not provide the call of the question and the multiple choice answers until class. For this first quiz, I do not provide the quiz before class.
2. Students turn in their individual quizzes for grading
3. Each team then re-takes the same quiz as a team. Emphasize that each student in the firm must understand why the answer chosen is the correct answer and that you will call on individuals at random to explain their firm's rationale. This forces discussion and debate over the materials, so that students deepen their learning of the material.

While the students are taking the quiz, walk around the room and listen in on discussions. Listen especially for common misunderstandings so you can include these as "distractors" in future quizzes. Do not, however, interrupt the discussions, even if invited to participate.

I recommend the use of "scratch off" quiz papers. When the team chooses an answer, a student scratches off the covering for that response. If a star appears, the response is correct. Otherwise, the team choose another answer until they find they have answered correctly. If the team chooses correctly the first time, they get 3 points, 2 points for two uncovered answers, 1 point for three and no points for more than 3 tries. I also have the students write 1, 2, 3 next to the questions on the quiz sheet to indicate which was the first, second and third choice in order to facilitate point adjustments after appeals. The advantages of these answer sheets is that each firm can work at its own pace but also get immediate feedback. This quickly gives the group feedback about which members are better prepared or more fully understanding the material than others as well as their learning as a whole. The scratch off answer sheets (known as IF-AT sheets) can be ordered from http://www.epsteineducation.com/home/about/default.aspx.

Other methods for team response can be response cards, in which all firms "vote" by holding up an A, B, C, or D (or T/F) card and visually displaying their answers. I would imagine that faculty using clickers could incorporate their use into this system as well.

4. When a firm is done with the quiz, they hand in the answer sheet and the quiz. I review the answer sheets as they are turned in and provide public acknowledgement to the firm or firms that received the most points on the quiz, which creates a sense of competition among the firms,

further facilitating group cohesion. Finally, we briefly review the quiz as a class. I don't necessarily review every question but use the results from the quiz and my own observations to reinforce points as necessary. I call on students to explain why certain answers are correct in order to spot check firm processes and student participation. I highlight interesting or important discussions I heard. I sometimes use presentation slides to visually reinforce key points from the quiz.

5. Finally, I provide firms with an opportunity to prepare and present "appeals'—if a firm believes the correct answer is one other than that noted as correct, or that a question is unfair or unduly vague or "tricky", they can prepare an appeal. You can provide in-class opportunities immediately for appeals, or take appeals on line outside of class. Appeals must be presented by a firm as a whole. If I accept an appeal, all firms that choose the newly correct answer are given revised points to reflect that change. Points are never subtracted from firms as a result of appeals. The "us against the teacher" dynamic an appeal sets up helps to forge firm cohesiveness and further refines understandings. Be careful not to grant appeals that are not well presented and well grounded or they will undermine the seriousness with which the students take the quiz in the first place.

QUIZ: Introduction to Professional Responsibility

1. Why is this course being taught using team-based learning?

a. Students learn more and more effectively in courses taught using team-based learning methods.

b. Law practice requires collaborative skills and TBL teaches those skills.

c. The ability to work well with others is more important to success than intellectual expertise.

d. All of the above.

2. The single most important factor in determining whether a team will be effective in problem solving is

a. The degree to which the team members share a common goal

b. The degree to which work is evenly distributed among members of the team

c. The degree to which the team members manage conflict

d. The abilities of the individual team members

3. On a quiz, the correct answer was B. Firm #1 got the answer correct. Firms #2 & #3 chose answer A. Firm #2 appealed the answer and was successful in the appeal. How will the group quiz scores be adjusted?

a. The scores of Firms #1 #3 will remain the same. The score of Firm #2 will be changed to reflect credit for the successfully appealed answer.

b. The score of Firm #1 will remain the same. The scores of Firms #2 & #3 will be changed to reflect credit for the successfully appealed answer.

c. The score of Firm #1 will be dropped to reflect Firm #2's successful appeal of the answer. The score of Firm #2 will be increased for the successfully appealed answer. The score of Firm #3 will remain the same.
d. The score of Firm #1 will be dropped to reflect Firm #2's successful appeal of the answer. The scores of Firms #2 & #3will be increased for the successfully appealed answer.

ANSWERS: 1. (d) 2. (c) 3. (a)

ASSIGNMENT: Professional Responsibility Law Firm Rules

As the chapter discusses, collaboration is an important skills for knowledge workers in general, including attorneys. In this course you will be working with your colleagues at regular intervals. You have been formed into law firms. Like real world legal practice, where few of you will have the opportunity to hand pick your work partners, you have been assigned to these firms according to your expressed interest and experience. Your work together will sometimes consist simply of sharing your learning through discussions and shared work product. Sometimes I will ask you to solve problems or make decisions as a firm. For the final project, you will combine these cooperative and collaborative tasks into a final written project that comes from your shared decision-making. You will be evaluating one another on your work and contributions to each other's learning.

Your first assignment within your firms is to introduce yourselves to one another, trade contact information, and establish some ground rules for your working together. These will be the rules against which you will be evaluating yourselves.

Prepare a list of these operating principles or rules of professional conduct for your work together (at least three, no more than five). You will be evaluating yourselves against these criteria at various points in the course, so strive for concrete and clear rules. Identify, if you wish, the procedures you will use if problems arise in the group. This is not meant to be an elaborate code—aim for no more than about two or three hundred words.

I will "grade" your firm rules on a scale of 1-3 and the assignment is part of your overall firm grade for the course.

Notes on this assignment

I give the students time in class to discuss and work on their code. Completed codes are due at the beginning of the following class. I have all work submitted through the course management software system because this helps me to easily keep track of submissions, but email or paper submissions work well also.

I have included for students the following handout on group process

HANDOUT: What Makes Groups Work Well?

1. A shared purpose

In any group there are likely to be a range of goals or purposes within the group. In a learning group, your task is assigned by the instructor, who has learning goals he or she wishes you to accomplish, but within your group, there are likely to be a diverse range of individual goals regarding that task. One student may want to get an A on every assignment. Another student may want to get the most practical learning out of each assignment but is less concerned about grades. A third student may want to accomplish enough to receive credit in the least amount of time possible.

"If a team learns together about its purpose and goals, it can avoid some of the dysfunctional team behaviors mentioned earlier. The root cause of social loafing, for example, often lies with team members who are privately pursuing their individual goals and have little commitment to the team purpose. At the other extreme, over-commitment can result, particularly in highly motivated voluntary teams… A political action group can become so focused on having its candidate win that it ignores other goals such as honesty and fairness." Anna B. Adams, D. Christopher Kayes, David A. Kolb, *Experiential Learning in Teams*, 36 Simulation Gaming *330-354 (*2005)

To facilitate a shared purpose, professors can ask students to reflect on their learning goals and then ask the students to share those goals within their groups. Have students develop a group goal and concrete guidelines for reaching that goal. Giving students an opportunity to allocate grading percentages among various elements of the course can provide a tangible measure of purpose.

2. A shared process

To get the benefits of a group, you have to be willing to operate as a group. In many experiences, what seems like group work is actually the aggregation of individual work. Without any interaction among the individuals and their contributions, these groups gain no advantage in effectiveness. Research has reported that the extent to which group members communicated and coordinated with each other predicted team effectiveness. J.E. Mathieu, T.S. Heffner, G.F. Goodwin, E. Salas and J.A. Cannon-Bowers, *The influence of shared mental models on team process and performance,* 85 Journal of Applied Psychology 273-283 (2000).

To get the benefits of group process, the group has to work toward cohesion, communication and conflict resolution. A team has to have some "spirit" or commitment to the group. This group cohesiveness is positively related with group performance and group effectiveness. R.A. Guzzo and G.P. Shea, *Group performance and intergroup relations in organizations,* M.D. Dunnette and L.M. Hough, eds., *Handbook of industrial and organizational psychology* 269–313 (Consulting Psychologists Press, Palo Alto, CA 1992). When a group is very homogeneous, it's easier to get along with one another. However, the downside of this type

of cohesion is that a group can be prone to "groupthink" in which groups don't adequately consider their decisions or alternatives before they take action or close discussion. More diverse groups—especially diversity of personality, education, skills and background—are more effective in decision-making and complex tasks. But the downside of diversity is the possibility of conflict. One of the most important factors in the effectiveness of group decision-making is the ability to handle conflict.

Conflict resolution and effective processes require, above all, good communication skills—especially skills of listening and shared leadership. One of the ways in which a group can become terribly ineffective is if it is dominated by one or more individuals or if some individuals are unwilling or unable to contribute to the group.

Steps the professor can take to insure shared process include:

- Explicit instruction in communication and team work skills signals to the students that these skills are important.
- Giving students an opportunity to self-assess their skills in team work can be a useful first step.
- Students should develop guidelines for their own group work—students then can refer to these external guidelines to nudge their fellow students toward shared process
- "Group processing provides feedback to group members regarding their participation, provides an opportunity to enhance the members collaborative learning skills, helps to maintain a good working relationship between members, and provides a means of celebrating the group's successes. One strategy is to ask each team to list three things the group has done well and one that needs improvement." Smith, K. A, *Cooperative Learning: Making 'Group work' Work*, Sutherland, T. E., and Bonwell, C. C. (Eds.), Using active learning in college classes: A range of options for faculty, New Directions for Teaching and Learning No. 67. (1996).

3. Confidence

"Several authors have argued that higher levels of perceived collective efficacy are associated with higher level group goals, greater levels of persistence toward the accomplishment of such goals, and greater performance accomplishments. When groups are confident of their abilities to perform a task, they will not only set higher goals but also will work harder toward accomplishing them even under adverse conditions. The group's confidence in its ability to perform a task may also positively affect members' mutual support for one another to carry out the work." Mauricio G. González, Michael J. Burke, Alecia M. Santuzzi and Jill C. Bradley, *The impact of group process variables on the effectiveness of distance collaboration groups,* 19:5 Computers in Human Behavior 629-849 (2003)(Citations omitted).

What Makes Teams Work: Group Effectiveness Research From the Shop Floor to the Executive Suite. By: Cohen, Susan G., Bailey, Diane E., Journal of Management, 01492063, 1997 Special Issue, Vol. 23, Issue 3

Part of the confidence in group efficacy can be generated from the professor. It is critical that professors take the time to explain why group work is relevant to the students. Susan

Brown Feichtner and Elaine Actis Davis, *Why Some Groups Fail: A Survey of Students' Experiences with Learning Groups*, 9:4 Organizational Behavior Teaching Review 75-88 (1985). Early feedback to groups to demonstrate the efficacy of their group work (a individual and then shared group quiz will nearly always provide statistical "proof" that the group outperforms nearly all individuals).

Assurance that individual accountability is built into the system will boost confidence that the group will operate free from social loafing and dominance. Clear directions and careful planning will further boost confidence.

Problems

One of the most common problems teachers encounter with team-based learning is moving from quizzes to problem discussions. If quizzes are truly simply assessing readiness to learn the material (i.e., have they read the materials), the students should be getting near 100% on these problems. The problems that follow can then be more complex and open-textured. The theory of team-based learning emphasizes that problems should be:

Significant – if problems are simply more drill on basic knowledge, the students will not truly prepare and will soon consider the course a series of "busy-work" exercises. Choose problems that are obviously relevant to the student's future as practicing attorneys.

Simultaneous Reporting on the Same Problem – in general all teams should work on the same problem and report their results simultaneously. This creates a subtle sense of competition among the groups, which can provide incentives for greater group identity, and can provide the opportunity for bringing team discussions into the larger class

Specific choice – problems that force students to make decisions about complex interpretation of the law or about exercising their discretion not only promote learning but build team development because they force students to exchange ideas rather than "divide and conquer" the work and because they permit students to report their decisions in a simple form, permitting frequent and immediate feedback.

Compare a problem that asks students to write a three page memo analyzing a problem to a problem that asks students to make a choice (disclose or not? Withdraw or not? Impose what sanction? Take what next step?) and then be prepared to describe that decision with a yes or no or one-sentence answer. The first problem will inevitably be divided among the group and will provide opportunities for free-loading, control, and all the negative aspects of group work. The latter will force the same degree of thinking but will be one that all students must be accountable for.

I have incorporated simulations and skills development into the team-based problems in a number of ways. For example, I have had student

- conduct an interview in their teams and then make decisions about the process of the interview (what was the single best question?) or the outcome (Will you accept this client?)
- choose the best or worst sentence in a document and redraft that sentence.
- try three different search methods to locate a particular source and choose which of these is the most effective
- identify the biggest mistake, or best choice, or strongest argument in analysis of a hypothetical

Peer Evaluations

Assurance that individual accountability is built into the system will boost confidence that the group will operate free from social loafing and dominance. Clear directions and careful planning will further boost confidence. I build peer evaluations into the course in several ways. First, each team has a folder in which all the products of their course work and the scores are collected, along with attendance records and a copy of their team rules. Second, for quizzes, I provide each team the distribution and average of the individual scores of their team members so they can see the effectiveness (or not) of their team. Third, I provide several points in the semester when students are instructed to review their rules and evaluate themselves: first as a team, then in terms of "behaviors that helped our team", and finally in terms of suggestions for improvement. Finally, students at the end of the course conduct a self and a peer evaluation which is a part of their final grade.

Here are the instructions I provide for that process:

PROFESSIONAL RESPONSIBILITY LAW FIRM EVALUATION

Your name

_____

OVERALL FIRM EVALUATION

Provide a description of how your firm functioned. What worked well in improving your collaboration; what you would think about doing differently in the future. Some criteria to consider in this overall evaluation include:

- Did your group have a clear focus? Did you work toward a shared purpose that respectfully balanced the goals of individuals in the group
- How well did the group engage the strengths and abilities of every member of the group? How well did the firm resolve conflicts among group members?
- How well did the group distribute work and roles?
- How well did the group communicate with one another? Did members ask each other for help and share ideas and work with each other and provided feedback?

INDIVIDUAL SELF AND PEER EVALUATION

Instructions: In the space below please rate each of the other members of your Firm numerically using the criteria you have prepared as a firm. To complete the evaluation you should: 1) List the name of each member of your firm in the alphabetical order of their last names (Do not include yourself) and, 2) assign points to reflect their relative contribution on a scale of 1-5. For each one of your firm partners, indicate the degree to which he or she contributed to your learning. If the student contributed to your learning more than others in the firm, they should be given a 4 or 5. If the student contributed about the same as other students they should be given a 3. If the student's contribution to your learning was less than most other students in the firm, they should be given a 1 or 2. Absent a very clear justification, scores should be distributed: that is, it would be an unusual situation in which each member of your firm contributed equally to your learning and it would be impossible for everyone to have contributed more than everyone else. In most firms there are some individuals who have contributed more than others to your learning.

Please assign scores that reflect how you really feel about the extent to which the other members of your firm contributed to your learning and/or your firm's performance. This will be your only opportunity to reward the members of your firm who worked hard on your behalf. Use the group guidelines you developed in your firm to guide your judgment. It is important that you raise the evaluation of people who truly worked hard for the good of the group and lower the evaluation of those you perceived not to be working as hard on group tasks. Those who contributed should receive the full benefit

of the group's grades; those who did not contribute fully should only receive partial credit.

For each partner, give one example of how that partner was helpful to your learning and one suggestion for how that partner could improve their professional collaboration. The more concrete your examples and suggestions, the better. Keep in mind that the most helpful evaluation balances positive and critical comments and is concrete. It focuses on behaviors rather than persons. If you do not distribute your scores among your firm, I will scrutinize especially carefully the descriptions of learning attributable to each individual and may return your evaluation for reconsideration if the descriptions do not support the score distributions.

Do the same for your own contributions: what was your strength in contributing to the learning of your firm members? What will you work to improve as a member of learning groups in the future?

After I have received all evaluations from each firm, I will aggregate scores and the comments (without attribution) for each individual student. I will send each student the feedback on their own contributions to the firm.

An example of an evaluation follows:

Name of partner Barbara Glesner Fines

Rating 2

Positive contribution to your learning:

Barb was always ready to find the relevant rules of conduct that related to our problems and was very good at reading the rules. This kept our discussions from being just "opinion polls." She was responsible for submitting the firm's problems to the assignment drop box and sometimes that meant she was the one who ended up transcribing our discussions into an intelligible answer for the firm. She did that very well.

Suggestion for improvement in collaboration

Barb was often late to class. While she was always prepared when she got there, the tardiness sometimes disrupted our discussions. I know she had a class just before this one that made it difficult to be on time sometimes, but even so, I would encourage her to try to manage her schedule so she could arrive earlier to meetings in the future.

Submit your evaluations to the assignment drop box by Monday at 11:00 am.

Appendix E: Writing Exam Questions

I use a variety of approaches to exam questions, depending on the outcomes I intend to test. The following examples are provided to demonstrate those approaches. Because teacher's manuals are readily available to students, I do not advise that you use these questions on your own examination, but they would be helpful to students as practice exam questions.

Example One: Short-Answer Essay Questions

Questions 1-5 are based on the following facts:

Attorney represents Client in a trespass and conversion action involving oil and gas rights on Client's land. Attorney was confident the case would involve at least $20,000 of legal fees (assume that amount is reasonable) and that he would have to bring in some additional help to handle the case. He proposed a fee agreement that he drafted and client signed. Pursuant to that agreement, Attorney and Client agreed that Client would pay an initial retainer of $1500, with the attorney's services to be billed at $200 an hour up to a maximum of $8000. Attorney deposited the $1500 to the client trust account. To cover the anticipated additional fees, Attorney also agreed to accept a 10% interest in mineral rights on some of Client's other land (not the land in dispute). Attorney drafted and executed a quitclaim deed for the mineral rights pursuant to their agreement and filed the deed at the county recorder's office.

Attorney worked three hours investigating and preparing the complaint, but had not yet filed the action, when he discovered that Client had lied to him about the survey of oil deposits on his land. In fact, the oil that Client was suing over was not from under Client's land at all. Client admitted the lies when confronted by Attorney, but indicated that he had a number of investors to whom he had made representations about the presence of oil on his land and the lawsuit would keep them from becoming suspicious.

Attorney notified Client that he had no basis for the lawsuit and that he was withdrawing. Client asked Attorney to first file the complaint before withdrawing, as the statute of limitations was about to run in two months. Attorney refused, withdrew, and gave a deed to the land back to client. Client requested his $1500 back, but Attorney indicated that this was non-refundable, pointing out that the agreement called this a "retainer." Client was unable to find another attorney to represent him before the statute of limitations ran and his investors began to withdraw their funds and one has filed suit for fraud.

Q. 1. Is Attorney subject to discipline for withdrawing?
A: No. The attorney would be assisting in a fraud and filing a frivolous petition if he continues to represent the client, thereby violating Rules 1.2 and 3.1. Thus he must withdraw

under Rule 1.16(a). Because the attorney has not yet entered an appearance in a court, he need not even ask for permission to withdraw.

Q. 2. Is Attorney subject to malpractice liability for failing to file the complaint before withdrawing?
A: No. Rule 11 of the Federal Rules of Civil Procedure (and its state counterparts) and the law of fraud and abuse of process generally make it clear that a client does not have a right to file a lawsuit based on information the client knows is false in order to support a fraudulent scheme. Attorneys never have a duty to violate the rules (and filing the complaint would violate Rule 3.1; assisting the client would be violating Rule 3.1 through the acts of another, thus violating Rule 8.4). Moreover, client has not been damaged because client has no legal rights to be protected.

Q. 3. Is Attorney subject to discipline for how he handled the $1500 retainer?
A: Yes, in one of two ways. First, if the $1500 really were a nonrefundable retainer, it should have been deposited in the attorney's account rather than the client trust account because the money belonged to the attorney from the time it was paid. To have deposited it in the client trust account is to commingle attorney funds with client funds in violation of Rule 1.15. Second, most jurisdictions find nonrefundable retainers to be per se unethical because they permit attorneys to recover fees without having completed any work or they represent unreasonable charges for any work performed (such as in this case, where the retainer allows the attorney to recover $500 an hour for work that the attorney represented would be charged at $200 an hour). Thus, the fee violated Rule 1.5.

Q. 4. Is Attorney is subject to discipline for drafting the deed granting him the interest in the client's land?
A: Yes. Some students will indicate that the attorney is subject to discipline because attorneys may not be paid in property interests, citing Rule 1.8's prohibition on attorneys taking an interest in the subject matter of litigation, but that rule doesn't apply here because this interest was not in land subject to dispute. However, attorneys doing business with clients like this, even if in the form of fee payments, must follow the guidelines of Rule 1.8(a) (Reasonable terms, explained clearly, with time and counseling to obtain review of the transaction by another attorney, and the client's consent—all of which must be in writing). Because it is unclear that attorney did so here, he does risk discipline.

Q. May Attorney reveal information regarding Client's fraudulent activity to the authorities? Is subpoenaed to testify in a grand jury investigation of Client's activities, must the attorney testify regarding Client's statements to Attorney?
A: No and yes. This question will test student understanding of the "is using the attorney's services to further the fraud" portion of Rule 1.6 and require that the student be able to distinguish the crime/fraud exception to privilege from the exceptions to the ethical duty.

Example Two: A Variation on True/False Questions

I have found this variation very useful for testing common misunderstandings in a format that is easy to grade and distinguishes student understanding. Because it is an unusual format, you must explain the format to students before the final exam and give them examples of questions and answers.

> The following questions each contain separate factual statements. For each, explain why the underlined portion of each statement is false.

1. Helen Helpful volunteers at a local Missouri homeless shelter. Part of her volunteer work there includes helping the residents obtain assistance from the government. She regularly represents these individuals in claims before the office of the Social Security Administration. Karen would not be subject to prosecution for the unauthorized practice of law in Missouri because she is not charging for these services.

2. Client agrees to pay attorney's bill every month within 20 days of receipt. Client falls behind in paying attorney. Because client is behind, attorney does not appear at a pre-trial conference in Client's case. Client explains that he does not know why attorney isn't present and the judge postpones the conference. Client calls attorney, who explains that he doesn't work unless bills are paid current—so Client then pays the bill and the case proceeds without any prejudice to Client. Attorney is not subject to discipline because Client was not harmed and Attorneys must be able to enforce their fee agreements.

3. Attorney was appointed to represent juvenile in a delinquency case. Attorney became aware that, because tuition is unpaid, the juvenile would be required to withdraw from his current private school at which the juvenile is doing well. Attorney believed that juvenile's expulsion from the school would hurt his delinquency case and undermine juvenile's efforts to reform his behavior. Therefore, attorney paid the client's tuition, but did not inform the client. Attorney is subject to discipline for failing to communicate with his client.

4. Tax Attorney, who is an associate in the Tax Department of XYZ, a 200-person firm, represents Client in setting up a number of trusts for his children. Lawyer, a partner in the Litigation Department of XYZ, has been approached by Paula, who was seriously injured when a dog attacked her. Paula wants to sue the owner of the dog. Client is the dog owner. Lawyer may represent Paula because the dog bite case and the trusts are not the same or substantially related matters.

5. An attorney must allow his client to testify unless he has a firm factual basis for concluding that his client will submit false testimony.

Example Three: Essay Questions

While many of my colleagues use very extensive hypotheticals, because I have rarely given take-home exams, I have preferred shorter hypotheticals lest exams because sheer endurance and speed contests. Here is a typical short essay:

Paula Plaintiff was injured while bike riding when she was struck by a car driven by Darren Driver. By the time Paula comes to you for advice, the statute of limitations had run on this claim a month earlier. You decide to file the action, (1) including only the year but not the month of the accident in the petition, (2) and hope that Darren's attorney does not raise the issue. Not only does Darren's attorney Ernest Emptyhead file an answer without noticing the defense, but he appears to be giving his client the worst advice possible. His answer admits key allegations that, you believe, he need not have admitted and raises defenses that are difficult to understand, at best, or entirely frivolous, at worst. (3) Worst of all, at your client's direction you have communicated three different offers to Emptyhead—including one limited only to your client's medical expenses—and he has said he will not give these offers to Darren. (3) Emptyhead, a recent graduate of Concord Internet Law School, (3) tells you that he wants to go to trial for the experience (3) and this may be his only chance.

You notice Darren for a deposition. During the course of that deposition, you ask Darren if he is aware of your prior settlement offers. (4) Emptyhead objects and reminds the client that his engagement letter delegates decisionmaking on whether to settle a case to Emptyhead. (3) You break in and tell Darren that Emptyhead is violating the rules of conduct to impose such a condition on a client, that Darren alone can decide whether to accept your offer. (4) You suggest to Darren that he should accept the settlement offer because going to trial would not be in his best interests. (4) Darren immediately indicates that he wishes to accept the offer of settlement and Emptyhead stops the deposition and leaves with Darren. Emptyhead balks at assisting in completing the final settlement agreement that Darren had said he wanted to accept, but he finally agrees when you indicate that you are inclined to report his incompetence to the bar if he doesn't get his client to sign the agreement. (5)

Have you exposed yourself to any discipline or liability risks by your actions?

<u>Competent answers would raise the following issues and analysis:</u>

1. First issue is whether it is competent to file an action after the statute of limitation has run. (1.1) Certainly no indication that you have discussed the substantial risk that this would be a waste of time with the client, a discussion that Rule 1.4(b) would surely require since deciding whether to file suit at all is not merely a "means" but is more in the realm of "objectives" and so

a matter for the client's decision. (1.2) Would be dishonest (8.4) to imply to the client that filing the suit would have a good chance of succeeding.

2. Is omitting the year and the month dishonesty? May not be good pleading practice and may make the complaint subject to dismissal, but is not a "false statement of fact" (3.3a1) and there is no affirmative obligation to disclose evidence, only to refuse to offer false evidence (3.3a3) . Moreover, since statute of limitations is a defense, you might argue that an attorney has no obligation to anticipate defenses in assessing whether there is a good faith basis for filing a complaint. Nonetheless, by omitting the month from the pleading, the attorney's sharp practice will not look good if the court discovers it. II would be concerned that a court might find this frivolous pleading under the circumstances and award Rule 11 sanctions and that you would be subject to discipline under Rule 3.1 or at least 8.4c or 8.4d.

3. Given this statement and all the other indications of Emptyhead's incompetence, there is a question as to whether you have a duty to report him under Rule 8.3a because you know (more than mere suspicion) that he has violated rules, including for example:

- 1.1 competence
- 1.2 taking away client's right to settle
- 1.4 failing to communicate settlement offers
- 1.7 putting his own desire to go to trial for the experience above his client's interests
- 3.1 frivolous defenses
- possibly 5.5—unauthorized practice - given his internet law degree

The total package raises substantial questions as to his honesty, trustworthiness, or fitness to practice in other respects. The real question is not whether you need to report him—probably you do given the number and severity of violations—but when you have to do so. Rule 8.4a doesn't give a timeline, but the *In re Riehlmann* case indicates that once the duty is triggered, the attorney must report "promptly"—so a report to disciplinary counsel is likely in order now, even though it likely won't be acted upon until the litigation is over.

4. The question here is whether you have crossed the line from legitimate deposition practice (asking questions) to advising an opposing client, in violation of Rule 4.2—Close question. Probably were okay asking if he knew about the offers; likely over the line at the point at which you start advising him regarding his attorney's duties and the wisdom of settling.

5. This is not appropriate—if you have a duty to report, you must report; not use the opportunity to gain an advantage in settlement. These attorneys have not only violated 8.3 but have likely added an additional violation under other rules as well. Under the 1968 Model Code of Professional Responsibility, DR 7-105(A), a lawyer was prohibited from bringing or threatening criminal charges if the sole purpose was to gain an advantage in a civil matter. This

rule was not incorporated into the Model Rules of Professional Conduct because it was considered overbroad and vague. Nonetheless, half of the states retained the provision when they adopted the Model Rules. Even without the rule, other provisions of the rule could apply in various circumstances of threats of reporting in order to gain advantages: most commonly, Model Rule 3.4 (Fairness to Opposing Party and Counsel), Model Rule 4.1 (Truthfulness in Statements to Others), Model Rule 4.4 (Respect for Rights of Third Persons), and Model Rules 8.4(b), (d) and (e) (Misconduct—especially "conduct prejudicial to the administration of justice").