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## M&F4th Chapter 4

### Notes, Slide Text, Optional Readings

Competence & Technology

Ethics 20/20 Commission

On Globalization & Technology

In 2009, then ABA President Carolyn B. Lamm created the [ABA Commission on Ethics 20/20](#) to perform a thorough review of the ABA Model Rules of Professional Conduct and the U.S. system of lawyer regulation in the context of advances in technology and global legal practice developments.

Why is technology going so fast? Why is it so hard to keep up with Westlaw, Lexis, Linked-In, Facebook, Twitter, presentation software and technologies, litigation support software, docketing programs, conflict of interest software?

Answer: [Moore's Law](#). At bottom Moore's Law is Gordon Moore's insight that technology grows at an *exponential* rate. We lawyer/humans do *not* grow exponentially, so we have to work extra hard to keep up with technology.

## Model Rule 1.1

Model Rule 1.1 is deceptively straightforward:

“A lawyer shall provide competent representation to a client.”

Easy, right? But Model Rule 1.1 is a master rule of sorts. If you are a Tolkien fan, there is one ring to rule them all, and Model Rule 1.1 requiring competence is one rule to rule them all, because we must competently protect client confidentiality, competently avoid client conflicts, competently avoid waiving the attorney-client privilege. And to do all of those things, including competently communicate with our clients, we must competently use technology.

As of August 2012, the Ethics 20/20 Commission added a new comment 8 to Rule 1.1 “Competence”.

### Comment 8: Maintaining Competence

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

So the command to keep abreast of changing technologies is now explicit. Just one of many changes wrought by the new [Ethics 20/20 Commission](#).

### Metadata

- [ABA Formal Opinion 11-460 \(4 August 2011\): Duty when Lawyer Receives Copies of a Third Party’s E-mail Communications with Counsel.](#)
- [ABA Formal Opinion 06-442 \(August 5, 2006\): Review and Use of Metadata.](#)

### Leveraging Your Tech Skills

An ABA Ethics tip [Competence: Acquire it or Hire it!](#), published in May of 2014 proposes that lawyers must be competent in legal tech, or must hire or associate with lawyers who are.

Other jurisdictions are chiming in, even for matters as mundane as storing client information in the cloud.

A lawyer may use an online data storage system to store and back up client confidential information provided that the lawyer takes reasonable care to ensure that confidentiality will be maintained in a manner consistent with the lawyer's obligations under Rule 1.6. In addition, the lawyer should stay abreast of technological advances to ensure that the storage system remains sufficiently advanced to protect the client's information, and should monitor the changing law of privilege to ensure that storing the information online will not cause loss or waiver of any privilege.

#### [NYSBA | Ethics Opinion 842](#)

California has also spoken on the issue. According to [California Proposed Opinion NO. 11-0004 \(2014\)](#), a lawyer must:

assess his or her own e-discovery skills and resources as part of the attorney's duty to provide the client with competent representation. If an attorney lacks such skills and/or resources, the attorney must take steps to acquire sufficient learning and skill, or associate or consult with someone with appropriate expertise to assist. Rule 3-110(C)....

Attorneys handling e-discovery should have the requisite level of familiarity and skill to, among other things, be able to perform (either by themselves or in association with competent co-counsel or expert consultants) the following:

1. initially assess e-discovery needs and issues, if any;
2. implement appropriate ESI preservation procedures, including the obligation to advise a client of the legal requirement to take actions to preserve evidence, like electronic information, potentially relevant to the issues raised in the litigation;
3. analyze and understand a client's ESI systems and storage;
4. identify custodians of relevant ESI;
5. perform appropriate searches;
6. collect responsive ESI in a manner that preserves the integrity of that ESI;
7. advise the client as to available options for collection and preservation of ESI;
8. engage in competent and meaningful meet and confer with opposing counsel concerning an e-discovery plan; and produce responsive ESI in a recognized and appropriate manner.

In short, acquire tech knowledge and expertise, or hire it, better yet, pursue both alternatives and educate yourself along the way. Nowadays tech skills are

indispensable to the practice of law. If you intend to pursue a career in litigation, then you must learn about [Electronically stored information](#).

### Recommended Tech Reading & Viewing

- [Ray Kurzweil: The accelerating power of technology](#)
- [Infographic: A Supercomputer In Your Pocket](#)
- [The Sedona Conference](#)
- [Maura Grossman](#)
- [Craig Ball](#), a plaintiff's-eye-view of the e-discovery process.

## Legal Malpractice

When Bad Things Happen

### Legal Malpractice

1. Client-Lawyer Relationship (foreseeable plaintiff) (Togstad);
2. Duty – Expert Testimony or Common Knowledge
3. Breach;
4. Causation (actual = but for = case within a case) (proximate = foreseeable consequences)
5. Damages (emotional distress or punitive dePape)

### Legal Malpractice Criminal Defense

In a legal malpractice action brought by a criminal defendant:

- Majority rule – D must prove actual innocence.
- But see [RLGL § 53 Comment d](#): “Although most jurisdictions addressing the issue have stricter rules, under this Section it is not necessary to prove that the convicted defendant was in fact innocent.”

### [RLGL § 53 Causation and Damages](#)

#### Causation?

What if client would have lost the case no matter what the lawyer had done? Only way to prove otherwise is to have retry the original action within the context of the legal malpractice suit. The so-called suit-within-a-suit remedy,

which we first saw in the *Togstadt* case (very difficult to do). Some states shift the burden of proof in these suits (Louisiana).

### **Remedies To Redress Malpractice?**

- Out of pocket damages.
- Lost opportunities.
- Punitive damages.

### **Duty to Inform Client of Lawyer's Own Malpractice?**

*Matter of Talon* (NY.App.Div. 1982) - Lawyer must inform the client, withdraw, and advise the client to get independent legal advice.

*In re Blackwelder* (Ind. 1993) - Lawyer missed filing and default judgment taken. Lawyer agrees to handle bankruptcy for free in exchange for release from malpractice. Clients not advised to get independent counsel.

## **Breach of Fiduciary Duty**

### **Professional Negligence and Breach of Fiduciary Duty**

#### **[RLGL § 53 Causation and Damages](#)**

Breach of fiduciary vs. professional negligence?

RLGL describes the difference this way:

Many claims brought by clients against lawyers can reasonably be classified either as for breach of fiduciary-duty or for negligence without any difference in result. For example, the duty of care enforced in a negligence action is also a fiduciary duty; likewise, the specific duties of lawyers help define both their fiduciary obligations and the contents of their duty of care. Most rules applicable to negligence actions also apply to actions for breach of fiduciary duty. Pleadings typically add a fiduciary-duty claim to a negligence count for reasons of rhetoric or completeness. Whether classifying a claim as one for breach of fiduciary duty affects the applicable limitations period depends on the language, structure, and policies of a jurisdiction's statute of limitations and is beyond the scope of this Restatement.

## RLGL § 53 Causation and Damages

### Lawyers' Fees Affected by Breach of Fiduciary Duty?

Hot area!

Fee forfeiture now one of the favorite remedies, because it does not require a showing of actual damages, or suit within a suit.

Theory is that the lawyer who breaches fiduciary duty to the client has in effect breached the actual or implied contract that required payment of fees.

### Ineffective Assistance of Counsel

Counsel's representation fell below an objective standard of reasonableness, measured by prevailing norms of practice reflected in:

- ABA standards
- Expert testimony
- Per se rules; nonstrategic choices (breach of fiduciary duty of obedience or loyalty)

M&F3rd p. 120

Counsel's deficient performance prejudiced the defendant (causation): Actual prejudice: But for Counsel's unprofessional errors, the result of the proceeding would have been different, i.e., not harmless error (proceeding presumptively reliable). Per se rules: Denial of counsel during a critical state of the proceeding led to a forfeiture of the proceeding itself (proceeding presumptively unreliable or totally nonexistent)

### Liability To Third Parties

#### Professional Malpractice Committed Against Others?

- Controversial and evolving area of law.
- Privity? Prospective clients?
- Third-party beneficiary?
- Intended beneficiary?
- Negligent representation? Lawyer as evaluator problems (*Greycas, Inc. v. Proud*).

For a nonclient to succeed in a negligence action against an attorney, he must prove that the primary purpose and intent of the attorney-client relationship itself was to benefit or influence the third party.

*Pelham v. Grieheimer* (Ill. Sct. 1982)

### **Model Rule 4.1(a)**

#### **Truthfulness In Statements To Others**

- *ABA/BNA Lawyers' Manual On Professional Conduct, Truthfulness In Statements To Others*

Rule 4.1(a) prohibits a lawyer from knowingly making a false statement of material fact or law to a third person in the course of representing a client. A comment to the rule defines “false” statements to include not only affirmative misstatements but also “partially true but misleading statements,” as well as “omissions that are the equivalent of affirmative false statements.”

Rule 4.1(b) requires a lawyer to disclose information if silence on the lawyer’s part would amount to assisting a client in a crime or fraud, but only if the information comes within one of the exceptions to the rule on confidentiality.

A lawyer’s duty of truthfulness to others is also addressed by:

- Rule 3.3 (candor toward tribunals),
- Rule 3.5(c)(3) (misrepresentation to jurors),
- Rule 7.1 (false communications in advertising),
- Rule 8.1 (statements to bar and disciplinary authorities),
- Rule 8.2(a) (statements about judicial and legal officials),
- 8.4(c) (misrepresentation generally).

Tort law, especially the law of negligent misrepresentation, also imposes disclosure duties on lawyers.

### **Misrepresentation**

Rest. 2nd Torts: §§ 525-552C

- A false representation;
- Concerning a presently existing material fact;

- Which the representor knew to be false or was made recklessly (fraud), or which was made negligently;
- For the purpose of inducing another to act;
- The other party reasonably relied on it;
- To his injury or damage.

See [Liability For Fraudulent Misrepresentation](#)

## Negligent Misrepresentation

Restatement Torts 2nd § 552

One who, in the course of his business, profession or employment ... supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

## Ye Olde Privity Rule

No liability in an indeterminate amount for an indeterminate time to an indeterminate class. –Benjamin Cardozo

*Ultramares Corp v. Touche*, (NY 1931)

Touche Niven accountants audited rubber importer, Fred Stern & Co, and failed to discover that the company had overstated accounts receivable.

Touche Niven supplied 32 copies of its audits, which Touche knew would be used to raise money from banks and other creditors for the operation of Fred Stern & Co.

Ultramares Corp. received a copy and lent money on the strength of Touche Niven's opinion. Stern declared bankruptcy, and Ultramares sued for the amount of the Stern debt, declaring that a careful audit would have shown Stern to be insolvent.

The audit was found to be negligent, but not fraudulent, but the judge set this finding aside based on the doctrine of privity, which protects auditors from third party suits. The appellate court reinstated the negligence verdict.

The case then went to the New York Court of Appeals, Judge Benjamin Cardozo presiding.



Cardozo held that the claim in negligence failed on the ground that the auditors owed the plaintiff no duty of care, there being no sufficiently proximate relationship. He said no “to a liability in an indeterminate amount for an indeterminate time to an indeterminate class.”

A requirement of privity, not of contract but of relationship, was laid down.

### **Privity Rule In Nebraska**

Nebraska relaxes the privity requirement in estate planning actions.

Privity not required when mother of decedent’s children (as next friend) sued lawyer who allowed the statute of limitations to run on a wrongful death claim brought on behalf of children for their father’s death.

The court held that the attorney had an independent duty to the children, as decedent’s next of kin, to timely prosecute the wrongful death claim.

*Perez v. Stern* (NE 2010)

*NE: Attorneys Owe A Duty to Direct Beneficiaries.*

### **Lawyer Tort Liability to Nonclients**

- Malpractice
- Misrepresentation
- Aiding & Abetting a Client’s Breach of Fiduciary Duty
- *Attorney Representing Closely Held Entity Owed Duty to Protect Company’s Two Owners*

### **Lawyer Tort Liability to Nonclients: Malpractice**

- Third-party beneficiaries of clients, RLGL §51(3);
- Those invited to rely by the lawyer (prospective clients, Togstad) RLGL §51(1), Rule 1.18;
- Those invited by lawyer or client to rely, if not too remote from the lawyer to be entitled to such protection RLGL § 51(2), Greycas.

### **Lawyer Tort Liability to Nonclients: Misrepresentation**

- Intentional or reckless misstatements = fraud. Lawyer is liable to all those who reasonably relied on the false information.

Rest. 2nd Torts §531, RLGL §51, comment f and §56;

Negligent misstatements: Lawyer is liable to those in a limited class of persons “for whose benefit and guidance he intends to supply the information or knows the recipient intends to supply it.”

Rest. 2nd of Torts §552(2), RLGL §56 and Greycas.

### **Lawyer Tort Liability to Nonclients: Aiding & Abetting Client’s Breach**

- Lawyer knows client breached a fiduciary duty;
- Lawyer provided substantial assistance to breach, not just assistance to the client;
- Lawyer knows client’s conduct constitutes a breach of fiduciary duty;
- Breach causes harm to 3rd parties.

### **Optional Readings**

[“You’re All Out!”](#): A defense attorney uncovers a brazen scheme to manipulate evidence, and prosecutors and police finally get caught. By Dahlia Lithwick, *Slate Magazine*, 28 May 2015.