Professional Responsibility Outline – Professor Pettit – Spring 2011

Introduction

Where Do "Ethics" Rules Come From?

I. Professional Responsibility is best described as "The Law Governing Lawyers"
II. Several Recurring Ideas or Values:
    a. The Client is the Center of the Universe, If Not the Whole Universe
        i. The law and rules governing lawyers should aim to protect the rights and to honor the autonomy of clients in a complex legal world
            1. To do so, the rules must allow lawyers to act for clients in any lawful manner that clients could act for themselves if they were legally trained
        ii. Lawyers must be devoted to achieving the goals they have been retained or appointed to pursue
            1. They must accept and defer to their clients' objectives once they accept a matter
                a. So long as the clients' means and ends are lawful, lawyers should have no qualms over whether they are fair or hurt others
    b. Lawyers and the Legal Profession Also Deserve Autonomy
        i. Lawyers are not technicians robotically obligated to ignore the wrongness of a client's instructions
            1. They are moral agents entitled to decline to be the instruments of injury to others that they may find unconscionable even if lawful
        ii. Respecting the lawyer's autonomy also recognizes that law is a profession associated with the administration of justice and not merely a collection of highly trained operatives willing to suspect all moral judgment for a fee
    c. The Bad Client Problem
        i. Some clients are willing to use lawyers to commit frauds or crimes against others or against the administration of justice
            1. Of course, lawyers cannot knowingly assist a client's fraud or crime [Rule 1.2(d)]
        ii. Bad clients are owed no professional concern or protection
            1. The rules and laws governing lawyers must therefore permit, perhaps even require, lawyers to protect the victims of a client's ongoing illegal conduct and the system of justice itself, even if that harms the client
    d. The Tempted Lawyer Problem
        i. Lawyers may be tempted to abuse their client's trust for their own benefit or the benefit of other clients or third parties
            1. If the rules permit lawyers to represent a client when there is significant risk that the lawyer's own conflicting interests or the conflicting interest of others will compromise the lawyer's devotion to the client, clients may hesitate fully to trust their lawyers
                a. Since client trust is crucial in enabling lawyers to pursue their clients' goals and protect the clients' autonomy, the rules and law governing lawyers should forbid lawyers (absent client consent) ever to occupy positions in which they are tempted to betray their clients, without regard to whether any particular lawyer would actually succumb to the temptation
    e. The Poor Lawyer Problem
        i. Any lawyer, wherever on the scale, may on occasion perform so far below average that the laws and rules governing lawyers should provide a compensation system for clients who suffer because their lawyer has seriously messed up

ii. The rules and law should also adopt prophylactic measures that aim to insure competence in the first instance, so that the amount of messing up is as little as possible

f. The Justice and Fairness Model
   i. The law has many influences, but at least two are *justice* and *fairness*
      1. Legal rules have an interest in both

III. Who Makes the Rules?
   a. Constitution
      i. Sixth Amendment guarantee of the effective assistance of counsel in criminal cases, e.g.
   b. Ethics Rules = the main source of rules governing the behavior of lawyers
      i. ABA is a private entity that promulgates the Code of Professional Responsibility and its Model Rules of Professional Conduct
         1. But before a rule in either document can be more than a *model* – that is, before it can actually govern a lawyer's behavior – a court must adopt it
            a. Almost every state has adopted a version of the MRPC
               i. Therefore, there is both variation and uniformity across the states
      ii. Three Major Incarnations of Rules and Standard from the ABA:
         1. Canons of Professional Ethics (1908-1970)
         2. Code of Professional Responsibility (1970-1983)
         3. Model Rules of Professional Conduct (1983-present)
   c. Bar Association Ethics Committees
      i. A lawyer may write for advice about prospective conduct and ask for an advisory opinion
         1. Compliance with such an opinion demonstrates a lawyer's good faith, although the opinions generally are not binding on a disciplinary committee or court

The Attorney Client Relationship

<u>Defining the Attorney-Client Relationship</u>

What Do Lawyers Owe Clients?

I. Competence
   a. **Rule 1.1: Competence**: A lawyer shall provide competent representation to a client. Competence representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation
      i. Comment [1]: In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, <u>relevant factors</u> include:
         1. the relative complexity and specialized nature of the matter
         2. the lawyer's general experience
         3. the lawyer's training and experience in the field in question
         4. the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question
      ii. Comment [2]: A lawyer need <u>not</u> necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar
         1. A lawyer can provide adequate representation in a wholly novel field through necessary study
      iii. Comment [4]: A lawyer <u>may</u> accept representation where the requisite level of competence can be achieved by reasonable preparation
   b. Incompetence can come in many forms: ignorance, inexperience, neglect, lack of time
      i. Lawyers are warned against assuming more work than they can competently handle
   c. How is this Duty Enforced?
      i. While incompetence may lead to discipline, it rarely does absent egregious error or a pattern of neglect

ii. Incompetence is often the basis for malpractice liability, assuming the client suffers damages, or for an ineffective assistance of counsel claim under the Sixth Amendment
iii. Lawyers who hold themselves out as specialists will often be subject to a higher standard of care

II. Confidentiality

a. Rule 1.6: Confidentiality of Information

i. (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b)
ii. (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
    1. (1) to prevent reasonably certain death or substantial bodily harm;
        a. Comment [6]: . . . [this] recognizes the overriding value of life and physical integrity . . . Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat . . .
    2. (2) to *prevent* the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
    3. (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
        a. Comment [8]: [This] addresses the situation in which the lawyer does not learn of the client's crime or fraud *until after it has been consummated*. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct [as in Rule 1.6(b)(2)], there will be situations in which the loss suffered by the affected person can be prevented, rectified, or mitigated …
    4. (4) to secure legal advice about the lawyer's compliance with these Rules;
    5. (5) 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; or
        a. Comment [11]: A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary
    6. (6) to comply with other law or a court order
iii. Comment [14]: Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified
    1. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure
    2. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose
iv. Comment [18]: The duty of confidentiality continues after the client-lawyer relationship has terminated. *See* Rule 1.9(c)(2)
    1. It even survives a client's death

b. Rule 1.6 uses "may" rather than "shall"
    i. Therefore if you are confused whether you can disclose or not, you are safer not disclosing
        1. There appears to be an incentive not to disclose
            a. And this might suggest a strong presumption in favor of confidentiality
c. Confidentiality is that between lawyer and client – so you need to identify the client
    i. Ex: Anna is paying for Ken's legal fees; Ken is the client though; cannot disclose confidential matters to Anna, even though she is paying the client's legal fees
d. Remember: <u>All</u> Rule 1.6 elements need to be addressed/satisfied:
    i. Relating to the representation of a client
    ii. Unless …
        1. the client gives informed consent
        2. disclosure is impliedly authorized
        3. permitted by paragraph (b)
    iii. Paragraph (b)(1)-(6) applicable
e. Ex: "All's Not Well": homeowner sent attorney a doctored inspection report, which the attorney forwarded to the opposing side's counsel – not knowing it was not 100% accurate; attorney later learns that there is something missing in the inspection report that could cost the buyers $100K; what can the attorney do?
    i. This information does relate to the representation of a client
    ii. There is no informed consent
    iii. Disclosure has not been impliedly authorized
    iv. Is disclosure permitted by Rule 1.6(b)?
        1. 1.6(b)(2) → disclosure to prevent a fraud that has not happened yet . . . and this one has
        2. 1.6(b)(3) → disclosure to prevent, mitigate, or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or *has resulted* from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services
            a. Might need to know the jurisdiction's definition of fraud before we disclose on the basis of Rule 1.6(b)(3)
    v. BEFORE disclosing, attorney should confront their clients and see what they have to say – they might be willing to disclose or come clean about the report
        1. We should inform them that they might have legal exposure down the road, and it is in their interests to disclose now
    vi. Because the lawyer passed along the report to another lawyer, he might be liable to the buyers now
    vii. RISKS:
        1. Disclosure – break confidentiality rules
        2. Non-disclosure – lawyer might be liable for his participation

        . . . therefore, this is <u>not</u> a situation where if we are uncertain, it is safer to not disclose
f. Ex: *Spaulding v. Zimmerman* (Minn. 1962): D hid the medical diagnosis of a juvenile during settlement negotiations; had it not been for P's minority status, the settlement likely would have been upheld in D's favor because D had no duty during the course of the negotiations (an adversary relationship) to disclose this knowledge; however, the court had to approve the settlement and by D continuing to conceal the knowledge, D took a calculated risk that the settlement would be final; result: settlement was vacated, primarily due to P's minority status, which required judicial review of the settlement
    i. <u>No</u> ethical rule that requires disclosure of this type of information
        1. **But**, full disclosure is required to the judge before he approves the settlement
g. Ex: *Perez v. Kirk & Carrigan* (Tex. 1991): law firm alleged that no attorney-client relationship existed and no fiduciary duty arose because Perez never sought legal advice from them; court

found the facts supported the creation of an attorney-client relationship: law firm told P that they were repping Coca-Cola and they were P's lawyers and that they were going to help in giving his statement to Coca-Cola, even though he did not offer, nor was he asked, to pay the lawyers' fees; another factor that might be at work here: P was a truck driver – not a corporate officer – so maybe we should resolve doubts in his favor, assuming it was reasonable for him to assume that lawyers for the employer were also lawyers for the employees (i.e., P)

- i. An agreement to form an attorney-client relationship may be implied from the conduct of the parties
  1. The relationship does not depend upon the payment of a fee, but may exist as a result of rendering services gratuitously
  2. The attorney client privilege and the duty of confidentiality protect information gained from a potential client even if no retention ensues
- ii. The relation between attorney and client is highly fiduciary in nature
  1. If you are a fiduciary, you have to act in the best interests of the person for whom you are a fiduciary (even over your own interests)
- iii. Whether this is an attorney-client privilege issue (wrongful disclosure of a privileged statement) – *or* – a breach of fiduciary duty (wrongful representation that an unprivileged statement would be kept confidential), Ds are in the wrong

h. Privilege vs. Ethically Protected Information

- i. **Confidentiality** is broader
  1. Source: ethics, agency, fiduciary law
  2. Confidential information is that gained from the client *or* from others in the course of representing the client
- ii. **Privilege** is narrower
  1. Source: evidence, statutory law
  2. Privileged information is only that between a lawyer and a client
  3. Everything privileged is also confidential
     a. *But* there are confidential things that are not privileged
        i. Ex: a subpoena can reach information that is confidential but not privileged
           1. Rule 1.6(b)(6): to comply with a court order

i. Policies Behind Privilege & Confidentiality Rules

- i. Empirical: these rules will encourage the client to trust her lawyer and to be forthcoming with information that the lawyer may need to represent her
  1. This will allow the lawyer to be a better job
- ii. Normative: regardless of the effect on a client's willingness to be candid or the quality of the lawyer's work if lawyers are not informed, lawyers should respect a client's confidences just because it is right to do so
  1. It respects the client's autonomy

j. Entity Clients

- **i. Rule 1.13: Organization As Client**
  1. (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
  2. (b) If a lawyer for an organization *knows* that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including,

if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.

3. (c) Except as provided in paragraph (d), if
    a. (1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and
    b. (2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization,
    - then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.
4. (d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.
5. (e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.
6. (f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.
7. (g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

ii. Control Group: the privilege protects only communications with those who actually run the company
    1. If the employee making the communication, of whatever rank he may be, is in a position to control or take a substantial part in the corporate decision, then in effect he is, or personifies, the corporation

iii. Subject Matter Test: requires only that the communications concern factual information gained in the course of performing the speaker's corporate duties

iv. Ex: *Upjohn* (U.S. 1981): rejects the control group test as unpredictable and inadequate to protect the purposes served by confidentiality and privilege rules, but SCOTUS does not announce a new test → handle the issue case by case
    1. ***Upjohn* Factors**:
        a. The communications at issue were made by corporation employees to counsel for corporation acting as such, at the direction of corporate superiors in order to secure legal advice from counsel
        b. Information, not available from upper-echelon management, was needed to supply a basis for legal advice concerning compliance with securities and tax law, etc., and potential litigation in these areas

c. The communications concerned matters within the scope of the employees' corporate duties
d. Employees themselves were sufficiently aware that they were being questioned in order that the corporation could obtain legal advice

2. Most case law suggests that if the privilege exists, it survives the employee relationship
    a. Meaning *Upjohn* would apply to current and former employees

v. Ex: ***Goodfarb*** (Ariz. 1993): no privilege for witnesses or employees merely observing, but if their actions are involved somehow in the legal dispute, then yes – privileged
    1. This is a narrower test, as compared to *Upjohn*
    2. Everyone is entitled to information from witnesses, so if all you are is a witness, you should not be protected by the privilege

vi. RST: communications are privileged if they are between an agent of the organization and a lawyer (or lawyer's agent) and the communication "concerns a legal matter of interest to the organization"
    1. Almost everything is privileged under the RST
        a. *Cf.* if someone is does not even qualify as an agent or employee of the organization, no privilege even under this broad test

vii. The company alone controls the privilege
    1. Except in those unusual instances where the constituent and the company are deemed co-clients
    2. Because a constituent may not appreciate the distinction, Rule 1.13(f) may require a caution [*Upjohn* warning]

viii. What is the Right Policy/Test?
    1. One consequence of *Upjohn*, the RST, and even of the narrower control group test, is that companies are encouraged to place investigations that may produce embarrassing information under the overarching authority of counsel, thereby increasing the chance of successfully claiming privilege for what the investigator uncovers, so long as the client can show that counsel's purpose was to "render legal advice or services to the client"
        a. Is this a good thing?
            i. Might be if we consider that lawyers might get better and/or more information from their expertise
            ii. Might not be if we are worried about overbroad corporate secrecy
    2. *Upjohn* assumed that the Government was free to question the employees who communicated with counsel, but is this true?
        a. What about Rule 4.2's no contact rule when someone is represented by counsel?
        b. When the no-contact rule does apply – and it certainly binds lawyers representing private clients – won't it further magnify corporate secrecy by preventing an opposing lawyer from seeking informal interviews with a company's constituents?
    3. **Once you determine that the attorney-client privilege applies, that privilege is absolute** (absent some exception)
        a. There is no balancing

ix. Other Rules to Consider:
    1. Rule 4.2: Communication with Person Represented by Counsel
    2. Rule 4.3: Dealing with Unrepresented Person

x. Ex: "Slip and Fall": customer slipped and fell; General Counsel oversaw the investigation and asked security guard to investigate and conduct interview; are any of the interviews privileged?

1. Note: Although this is security conducting the interviews (and we know there is no security guard-client privilege), generally speaking agents of lawyers are also covered by the attorney-client privilege
2. Head of Maintenance
    a. Control Group Test: only if he is in a position of control or to take a substantial part in corporate decision making
    b. *Upjohn*: no specific test, so need to consider the factors
    c. *Goodfarb* Test: his actions were involved in the legal dispute, he is not merely a witness, so this interview is privileged
    d. RST: privileged
3. Person who waxed the floor last
    a. Probably privileged on all tests but the Control Group
4. Salesperson who was returning from break
    a. Probably not privileged under all tests but the RST
5. Salesperson who was at the store for personal shopping only
    a. Probably not privileged under all tests but the RST
6. Prior Head of Maintenance, retired, who established the store's standards for waxing
    a. Control Group: not privileged
    b. *Upjohn*: privileged, if the test applies to former and current employees
        i. So if the privilege existed while she was employed, then likely survives the employment relationship
    c. *Goodfarb*: privileged because her actions were involved in the legal dispute, she is not merely a witness
    d. RST: privileged
7. President of the wax supplier company
    a. NO privilege here – under any test – because he is not an agent or employee
8. Customer
    a. NO privilege here – under any test – because she is not an agent or employee

xi. Video: S was in house counsel for a company looking to sell their building; an environmental study was done that showed the presence of chemicals under the building; President of the company said they were going to clean it up, but not report it – which was required by state law; S said that if the President did not report it, S would; S got fired and is now being sued for improperly disclosing confidential information
1. Maybe under Rule 1.13, S should have gone to the Board and tried to convince them to disclose
2. This was information relating to the representation of a client; there was no informed consent; disclosure was not impliedly authorized; so disclosure only OK if permitted by (b)
    a. (b)(1) – draft report said the chemical was fatal even in small quantities
        i. But, the company has been there for years and experienced no adverse effects . . . so maybe this is not "reasonably certain"
    b. (b)(2) & (3) – might be a Q as to whether the lawyer's services were used to commit this crime/fraud . . . if it even counts as that
    c. (b)(6) – S disclosed because she thought she was complying with the environmental law
        i. Must decide whether the law required her to reveal
        ii. Should S have read the law to contain an exception for confidential or legally privileged information?

1. i.e., read the law so as not to violate attorney-client privilege

3. S is countersuing for retaliatory discharge
    a. Ex: *Balla* (Ill. 1991): no lawyer (even an in house lawyer) has a retaliatory discharge claim in Illinois, even though other employees would have a claim on the same facts

k. Government Attorney-Client Privilege
    i. Law is both in flux and uncertain about this issue
        1. Much authority seems to suggest though, that the government, as an entity client, enjoys the same protection for conversations between its lawyers and its agents as *Upjohn* bestowed on corporations
        2. **RST**: "Unless applicable law otherwise provides, the attorney-client privilege extends to a communication of a government organization"
        3. **8th Cir.** (Clinton scandal): assumed that the government enjoys attorney-client privilege in contests with other litigants
            a. *But* the court held that no government attorney-client privilege could be asserted to avoid a federal prosecutor's grand jury subpoena
        4. **D.C. Cir.**: "When an executive branch attorney is called before a federal grand jury to give evidence about alleged crimes within the executive branch, reason and experience, duty, and tradition dictate that the attorney shall provide that evidence
            a. With respect to investigations of federal criminal offenses government attorneys stand in a far different position from members of the private bar
                i. Their duty is not to defend clients against criminal charges and it is not to protect wrongdoers from public exposure"
        5. **2d Cir.**: explicitly *rejected* the views of the 8th and D.C. Cirs., upholding a claim of privilege, in connection with a federal grand jury investigation, for communications between a government lawyer and a former Connecticut governor
            a. "We believe that, if anything, the traditional rationale for the privilege applies with special force in the government context
                i. It is crucial that government officials, who are exposed to uphold and execute the law and who may face criminal prosecution for failing to do so, be encouraged to seek out and receive fully informed legal advice"
    ii. Arguments for a Narrower Government A-C Privilege (vs. that of corporate officials):
        1. There is no criminal liability exposure for an entity of the government, so it is a different situation than corporations, who can be subject to criminal liability
        2. Notion that government lawyers are representing the office and not the actual people in the office, so they will do what is best for the office rather than for the people who happen to be there
        3. Maybe there is a greater public interest in public officials obeying the law
    iii. Arguments Against a Narrower Privilege
        1. Presidents will avoid confiding in their lawyers because they can never know whether the information they share, no matter how innocent, might some day become pertinent to criminal violations
            a. As a result, Presidents may well shift their trust on all but the most routine legal matters from White House Counsel to private counsel who represent its occupant

l. Exceptions to the Privilege or Ethical Duty
    i. Hypo: "Under the law, your statements to me and the advice I give you are privileged and confidential. What that means is that anything you tell me or my staff will not go

outside this office without your permission and only for your benefit. under the law and my ethical obligations, no one can make us reveal our conversations and I will keep them completely confidential"

1. Wrong, wrong, wrong
    a. Could instead advise that there are some limited exceptions, e.g.

ii. Self-Defense and Legal Claims → Rule 1.6(b)(5)
1. Disclosure requires: (i) a good reason to believe revelation is necessary, and (ii) revelation only to the extent reasonably required
2. Rule 1.6 and several cases recognize that a lawyer's right of self-defense applies whether charges against the lawyer are made by the client or third parties
    a. Notion that lawyers need this type of protection
    b. Comment [10]: the self-defense exception does not require the lawyer to await the commencement of an action or proceeding that charges complicity in client wrongdoing, so that the defense may be established by responding directly to a third party who has made such an assertion

iii. Collection of Fees → Rule 1.6(b)(5)
1. When we reveal things for the purpose of collecting a fee, the information revealed is not likely to be as damaging (as it may be in other situations)

iv. Waiver
1. Clients can waive confidentiality and privilege
    a. Waiver may be explicit or implicit
    b. Waiver will be inferred when the client puts the confidential communication in issue in a litigation
    c. A client can constructively waive the privilege or confidentiality by revealing the privileged or confidential communications
    d. If a client waives privilege with respect to one aspect of a privileged conversation, there is a risk that the court will find the client has waived privilege with respect to the entire conversation
2. DOJ has defined, the refined and refined again, whether and when a prosecutor investigating a company or other organization may condition favorable treatment (like a promise not to indict) on the company's agreement to waive attorney-client privilege and work-product protection
    a. The Bar has been intensely hostile to this proposition
    b. DOJ suggests that a company's willingness to waive these protections demonstrates that it is truly repentant and cooperative

v. To Comply With Other Law → Rule 1.6(b)(6)
1. If the law or a court requires disclosure, a lawyer cannot expect to set up an overriding confidentiality duty to avoid it

vi. The Crime-Fraud Exception to the Privilege
1. Communications between clients and counsel are not privileged (although they may be ethically protected) when the client has consulted the lawyer in order to further a crime or fraud, regardless of whether the crime or fraud is accomplished and even though the lawyer is unaware of the client's purpose and does nothing to advance it
2. In order to invoke the crime-fraud exception, you have to offer evidence that there was a crime or a fraud, but that evidence may be withheld on the basis of privilege
    a. Circular argument (?)
3. Standard of Proof Required to Invoke the Exception:
    a. **1st & 2d Cirs.**: there need only be presented a *reasonable basis* for believing that the objective was fraudulent

b. **9th Cir.**: the party seeking the allegedly privileged information must prove the crime or fraud by a *preponderance of the evidence*
    i. A "reasonable basis to believe" standard is insufficiently respectful of the privilege
c. Ex: ***United States v. Zolin*** (U.S. 1989): "Before engaging in *in camera* review to determine the applicability of the crime-fraud exception, the judge should require a showing of a factual basis adequate to support a good faith belief by a reasonable persons that *in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies"
    i. This is a lesser standard to meet for *in camera* review

4. Effect of Confidentiality on Privilege → Ex: Jeffrey Purcell: Purcell acted properly in revealing Tyree's intention to commit a crime, but that act did not waive the privilege; the crime-fraud exception would only apply if Tyree had sought to use Purcell's assistance to commit a crime …
    a. See textbook if reasoning needed (pg. 63)

vii. Future Crimes or Frauds
1. Confidentiality rules may allow or require lawyers to reveal a client's criminal or fraudulent conduct in certain circumstances
2. Rule 1.6(b)(1) permits lawyers to reveal confidences to prevent death or substantial bodily harm, whoever the actor and even if no crime is involved
3. Rule 1.6(b)(3) is focused on the harm from concluded conduct
    a. And the authority to reveal is not limited to prevention of prospective or ongoing harm, but extends to disclosure to mitigate or rectify harm that has already occurred as a result of a concluded fraud

viii. Noisy Withdrawal → Rule 1.2, comment [10] & Rule 4.1, comment [3]
1. When a lawyer must withdraw from representing a client because of criminal or fraudulent behavior, the lawyer may be allowed or, to avoid assisting the fraud under substantive law, legally obligated to alert others that she also retracts any oral or written representation the client may still be using for the illegal purpose and which may have been based on false information
    a. A noisy withdrawal is not actually a full-blown exception to confidentiality because the lawyer says only that she retracts something previously said or written – she does not say why

ix. Identity and Fees
1. Assertions of privilege are generally unsuccessful in response to inquiries about a client's identity, source of legal fees, amount of fees, and other information about the representation not involving "communications"
2. 8th Cir. exceptions:
    a. When there is a strong probability that disclosure would implicate the client in the very criminal activity for which legal advice was sought
    b. When it would incriminate the client by providing the last link in an existing chain of evidence
    c. If, by revealing the information, the attorney would necessarily disclose confidential communications

x. Public Policy?
1. Courts occasionally suggest that the attorney-client privilege may sometimes have to give way to other values
    a. It may be pierced upon a showing of need, relevance and materiality, and the fact that the information could not be secured from any less intrusive source
        i. But, it is rare to find a case in which public policy requires disclosure of privileged information

2. Ex: *Swindler & Berlin* (U.S. 1998): the attorney-client privilege survives the death of a client
    a. O'Connor dissents, suggesting a balancing process
        i. "Where the exoneration of an innocent criminal defendant or a compelling law enforcement interest is at stake, the harm of precluding critical evidence that is unavailable by any other means outweighs the potential disincentive to forthright communication
            1. The cost of silence warrants a narrow exception to the rule that the attorney-client privilege survives the death of the client"

xi. Is There a Professional Relationship?
1. **Remember: In order for a communication to be ethically protected or to be privileged, there must be a client-lawyer relationship**
    a. The presence of a lawyer is a necessary but not a sufficient condition for that relationship

III. Agency
- a. Lawyers are agents for their clients and clients are the principles
    - i. Acting for the client means that the lawyer's conduct will be attributable to the client even if the lawyer makes a negligent mistake or willfully misbehaves
        1. Ex: *Taylor v. Illinois* (U.S. 1988): lawyer did not disclose who he was going to call as a witness, as required by IL law
            a. Although there are basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client, the lawyer has – and must have – full authority to manage the conduct of the trial
                i. Putting to one side the exceptional cases in which counsel is ineffective, **the client must accept the consequences of the lawyer's decision to forgo cross-examination, to decide not to put certain witnesses on the stand, or to decide not to disclose the identity of certain witnesses in advance of trial**
            b. Dissent: wants to distinguish misconduct from tactical errors, and only make the client accept the former
                i. The rationales for binding defendants to attorneys' routine tactical errors do not apply to attorney misconduct
                    1. An attorney is never faced with a legitimate choice that includes misconduct as an option
        2. Ex: *S.E.C. v. McNulty* (2d Cir. 1998): client argues that he should not be responsible for his lawyer's negligence; client assumed lawyer was working on the matter and once client discovered lawyer was not, client alleged that he tried to alleviate the problem; court denied client's motion because client provided no evidence that he did anything to prevent this from happening (notion that client is a sophisticated businessman and he should have known to check with the lawyer about this matter)
            a. Normally, the conduct of an attorney is imputed to his client, for allowing a party to evade the consequences of the acts or omissions of his freely selected agent would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent
- b. Lawyer's Authority to Settle
    - i. Cases disagree on whether a client can disavowed a settlement after her lawyer has accepted one

1. Rule 1.2(a) gives the client the unqualified right to decide whether to settle a civil matter or enter a plea in a criminal matter
    a. **Rule 1.2(a)**: A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision . . . as to a plea to be entered, etc.
        i. And ordinarily, a lawyer is impliedly authorized to choose the means (strategies, legal theories) he will employ to achieve the client's goals/decisions
    b. *See* Rule 1.4, comment [2]: If these Rules require that a particular decision about the representation be made by the client, Rule 1.4(a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take
2. Clients, however, may delegate authority to their lawyers to settle civil disputes (although the client can revoke the authority before it is exercised)
    a. If a lawyer has such *actual authority* to settle – express or implied by the client – then the lawyer will have acted properly, and the client will be bound
    b. A few courts have held that lawyers have "*inherent power*" to settle in certain circumstances
        i. Ex: if the client is an insurance company and they have laid out ground rules at the beginning of the representation
    c. The lawyer may have *apparent authority* (even if no actual or inherent authority) to settle, created because the client has said or done something that has led the other party to conclude reasonably, though mistakenly, that the lawyer has actual authority to settle
3. Cases are all over the map
    a. If apparent authority is sufficient, or if the jurisdiction subscribes to the idea of inherent authority, the client is bound and must look to her lawyer if she wants to claim that he exceeded his authority
    b. If the opposing party takes the risk because the lawyer needs actual authority and may not have it, it may insist that the client ratify the deal personally or that the lawyer produce proof of actual authority
4. Pettit: Regardless of authority, there probably should be some communication with the client regarding settlement

c. Vicarious Admissions
    i. **Vicarious Admissions**: a lawyer's statements may be the vicarious admissions of a client
        1. They can be used against the client in evidence, but they do not bind the client
            a. Therefore, you can still argue the point and offer evidence to the contrary – to try and disavow the statement, e.g.
    ii. **Judicial Admissions**: some statements a lawyer makes in court in a case then on trial (in open court or in pleadings, e.g.) do indeed bind the client
        1. Therefore, you are precluded from challenging that fact

IV. Fiduciary
- a. A lawyer has a fiduciary relationship with his client
    i. Lawyers must place their clients' interests above their own in the area of representation and must treat their clients fairly
        1. Conflict of Interest = when a lawyer's interests or the interests of another client or a third person create a significant risk to a lawyer's fiduciary obligations
            a. The lawyer must then not take up or must give up the matter, unless the conflict can be cured with the client's informed consent
- b. Some fiduciaries have higher obligations than others, and lawyers have among the highest

i. **The fiduciary duty is said to arise *after* the formation of the attorney-client relationship**
    1. At this point, the client will presumably have begun to depend on the attorney's integrity, fairness, superior knowledge, and judgment, putting aside the usual caution when dealing with others on important matters
    2. Also, the attorney may have acquired information about the client that gives the attorney an unfair advantage in dealings with the client
    3. Finally, many clients will not be in a position where they are free to change attorneys, but rather will be financially or psychologically dependent on the attorney's continued representation

c. The lawyer's fiduciary obligation applies to a fee agreement reached after the attorney-client relationship has been entered

V. Loyalty and Diligence

a. The duty of loyalty (a subset of fiduciary duty) requires the lawyer to pursue, and to be free to pursue, the client's objectives unfettered by conflicting responsibilities or interests
    i. Loyalty survives the termination of the attorney-client relationship and prevents a lawyer from acting adversely to a former client in matters substantially related to the former representation

b. The requirement of diligence imposes on the lawyer an obligation to pursue the client's interests without undue delay

c. Pettit's 3 Steps to Avoid Malpractice:
    i. Diligently proceed with the case [Rule 1.3]
    ii. Keep the clients informed of the status of their case [Rule 1.4]
    iii. Be nice to your clients

VI. The Duty to Inform and Advise

a. This duty is part of the concept on informed consent
    i. **Rule 1.0(e)**: "Informed consent" denotes the agreement by a person to a proposed course of conduct *after* the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct

b. Ex: *Nichols v. Keller* (Cal. 1993): client hires attorneys who are specialists in worker comp. claims; client claims he did not know about other claims or what to ask (is there a negligence claim, or a claim against a third party too?); attorneys allege that they were hired only to do the workers comp. claim and that is what they are experts in, so they should not be held liable for failure to alert client to other possible claims; court resolves doubts against the lawyer in this situation
    i. <u>One of an attorney's basic functions is to advise</u>
        1. Liability can exist because the attorney failed to provide advice
        2. Not only should an attorney furnish advice when requested, but he should also volunteer opinions when necessary to further the client's objective
            a. He need not advise and caution of every possible alternative, but only of those that may result in adverse consequences if not considered
            b. Rationale: as between the lay client and the attorney, the latter is more qualified to recognize and analyze the client's legal needs

c. Ex: *Janik v. Rudy* (Cal. 2004): **lawyers can be liable for not pursuing an additional basis for recovery**, even though the class certification did not contemplate that theory of recovery
    i. **The attorney must at least inform the client that the option is there** and then the client can consider whether to expand the retention agreement or to pursue the additional claims in another manner

d. *Cf*: *AmBase Corp. v. Davis Polk* (N.Y. 2007): here, the court rejected the client's theory of damages, noting that the plain language of the retainer agreement indicated that the attorneys were retained to litigate the amount of the tax liability and not to determine whether the tax liability could be allocated to another entity

i. FACTOR → sophistication of the client may be a way of distinguishing the results in these cases

e. What if the client asks the lawyer to estimate the degree of legal risk (e.g.)? Does the client have a right to know?
   i. Lawyers are reluctant to do this because they are interested in protecting themselves
      1. If you keep things vague, no one can sue you for being wrong
   ii. Gillers thinks that if the client wants to know, the attorney has the duty to inform and advise
      1. He suggests attaching some percentage range (low/moderate/high), instead of an actual number, with disclaimers are to the accuracy
         a. But this might give the appearance of precision to the client, and that could end up being more misleading than helpful
         b. Most lawyers would not even give percentage ranges though

f. Ex: "In a Box": ethical dilemma is that the lawyer has a Rule 1.4 duty to inform and advise the client fully, but also a Rule 1.6 duty of confidentiality
   i. Need to be careful about what we share, because cannot reveal any confidential information . . . even when attempting to comply with the duty to inform and advise
   ii. Maybe the lawyer tells his client that she should not do the deal, but he cannot tell her any more details as to why
      1. This would not violate any Model Rules
      2. But, the client is not able to evaluate the advice because you cannot discuss your reasoning
         a. Maybe there is a possibility that the client would have gone ahead with the deal despite knowing this information
   iii. One problem with trying to get informed consent to disclose is that it is to the law's firm advantage to get, but not to F&B's – so is the firm in a position that they can give good advice as to whether F&B should grant the consent (because the law firm is interested)
   iv. Cannot tell our client nothing because if she finds out after the fact she might bring a negligence claim for violating Rule 1.4(b) and failing to notify her
   v. Cannot simply get another partner to work on the case, who does not have this knowledge, because Rule 1.10(a) imputes knowledge from one partner to another within a law firm
   vi. SAFEST CHOICE: Law firm withdraws from representing the client, assuming she has time to get another lawyer and is not prejudiced in any way

Autonomy of Attorneys and Clients

I. Introduction
   a. Lawyers as professionals and as agents of their clients exercise judgment and make decisions to help achieve their clients' objectives through the law
      i. Clients delegate authority to their lawyers and therewith some of their autonomy
   b. The ends/means distinction only roughly allocates those decisions that properly belong to the lawyer and those that belong to the client
      i. <u>RST: Authority Reserved to a Client</u>
         1. Whether and on what terms to settle a claim
         2. How a criminal defendant should plead
         3. Whether a criminal defendant should waive jury trial
         4. Whether a criminal defendant should testify
         5. Whether to appeal in a civil proceeding or criminal prosecution
      ii. <u>RST: Authority Reserved to a Lawyer</u>
         1. To refuse to perform, counsel, or assist future or ongoing acts in the representation that the lawyer reasonably believes to be unlawful
         2. To make decisions or take actions in the representation that the lawyer reasonably believes to be required by law or an order of a tribunal

II. The Lawyer's Autonomy

a. Ex: "Ms. Niceperson"
    i. In general, lawyers can agree to extensions without consulting their client
        1. Rule 1.3, comment [3]: "A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client"
    ii. Gillers thinks that you can be a lawyer *and* a human being
        1. But most lawyers would advise <u>not</u> to say anything about the mistake
b. Ex: "I Don't Plea Bargain"
    i. Per Rule 1.2(a), the client has the authority to plea bargain
    ii. Lawyer alleges that he is abiding by the Rules – he tells them at the outset, so if they do not want to go forward in this manner, then they can find another counsel
        1. Rule 1.2(c): A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent
            a. So attorney is limiting his representation to battling in trial only
    iii. Gillers does not think this is ethical (and Pettit is not sold on it either)
        1. Even if you are up front and honest about your policies, a client cannot waive their ability to plea bargain in advance
    iv. Considerations:
        1. There might not also be enough time for the client to find another counsel once the plea bargain is offered (contingent on accepting within X days; on the eve of trial, e.g.)
        2. Maybe there is an associate in the law firm that is familiar with the case and can handle it if a plea bargain is offered and the client wants to accept
            a. So policy might be OK if there is shadow counsel that can pick up the case right away
c. Ex: *Jones v. Barnes* (U.S. 1983): there is <u>no</u> constitutional duty to raise every non-frivolous claim requested by the client
    i. The client <u>is</u> constitutionally guaranteed vigorous and effective advocacy – and the lawyer knows better than the client what a vigorous, effective defense is likely to be
        1. Promulgating a per se rule that the client, not the professional advocate, must be allowed to decide what issues are to be pressed seriously undermines the ability of counsel to present the client's case in accord with counsel's professional evaluation
        2. A brief that raises every colorable issue runs the risk of burying good arguments
    ii. Dissent is more concerned about the client's POV – that he is stuck with an *assigned* lawyer and his decisions, but it is the client's freedom at stake, not the lawyer's
    iii. Concurrence agrees that this is not a *constitutional* duty but, but does think there is an *ethical* duty to bring every claim that the client wants
        1. Note: there is nothing in the MRPC that say necessarily that you have to raise every claim suggested by the client
            a. Rule 1.2(a): "A lawyer shall abide by a client's decisions concerning the objectives of the representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued …"
                i. But the lawyer will argue that this concerns methods – not objectives – and that he did consult with the client, he just did not follow

III. The Client's Autonomy
a. Ex: "Memorandum from General Counsel: Diversity in Staffing": client wants mainly minorities to handle the matters it hires the law firm for (and Gillers notes that Wal-Mart and Microsoft have similar objectives); bottom line: the goal may be laudable, but we'd want to do research on anti-discrimination laws; also – what if we give them a minority attorney only for posterity's sake and

that lawyer is not best suited for the task/area of law – the client might not get the best legal service it could from the firm

b. Ex: "I'd Rather Die": if there is any question about a client's capacity, the attorney should investigate capacity and see if a GAL should be appointed
c. Ex: "Accept the Offer": client wants to accept a settlement offer is a divorce that is substantially lower than the attorney thinks she could get and that she should accept; per Rule 1.2(a), the client has the right to make the decision to settle, but to limit the lawyer's exposure, he should get documentation to the effect of "I acknowledge I am accepting an offer substantially lower than my attorney thinks I can get, and I am accepting against his advice"; lawyer could also try to stall her decision so she can think about it and not rush into a judgment, e.g.
d. Ex: *Olfe v. Gordon* (Wis. 1980): client hired attorney to handle the sale of her property; she only agreed to a first mortgage; attorney negotiated a second mortgage, leading client to believe it was a first; court held that expert testimony is <u>not</u> required to show that the attorney violated his duty; even if the client was less specific, attorney still needed to advise her of all the consequences, per Rule 1.4(b)
e. Charging the Jury on Lesser Criminal Charges
    i. *Compare*: *People v. Petrovich* (N.Y. 1996): D chose, against his lawyer's advice (to have the jury charged on murder and manslaughter/EED), to give the jury three options: guilty, not guilty, insanity; jury chose guilty; on appeal, court held that the defendant, who now questions the wisdom of his decision, cannot relieve himself of the consequences of his request
    ii. *With*: *Arko v. People* (Colo. 2008): defense lawyers wanted the judge to instruct on lesser included offense; defendant did not; trial judge listened to defendant; on appeal, the court held that the trial judge should have heeded counsel instead – the decision to request a lesser offense instruction is strategic and tactical in nature, and is therefore reserved for defense counsel

    . . . Gillers does <u>not</u> see how these cases can be distinguished to make them both right
f. Majority-Rule Settlements
    i. **Rule 1.8(g)**: A lawyer who represents two or more clients shall <u>not</u> participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or no contest pleas, *unless* each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and the participation of each person in the settlement
    ii. Citing this Rule, courts do not hold majority-rule agreements binding
        1. A majority rule arrangement only works if the commitment is irrevocable
            a. But the client can always withdraw the authority/consent before it is exercised
                i. Likely cannot withdraw the authority after the aggregate settlement had been entered into though
    iii. Do we like this rule?
        1. If we want to expand client autonomy, then maybe (but maybe not)
        2. We might want a factual inquiry about the sophistication of the clients, but that might bring up paternalism concerns
g. Clients with Diminished Capacity
    i. Rule 1.14: Client With Diminished Capacity
        1. (a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment, or for some other reason, the lawyer <u>shall</u>, as far as reasonably possible, maintain a normal client-lawyer relationship
        2. (b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial, or other ham unless action is taken and cannot adequately act in the client's own interest, the lawyer may

take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a **guardian ad litem**, **conservator**, or **guardian**

ii. The role of counsel for an incompetent is zealously to advocate the client's position
    1. Not simply to inform the court of counsel's perception of the client's best interests

iii. Advocacy that is diluted by excessive concern for the client's best interests would raise troubling questions for attorneys in an adversarial system
    1. And the attorney who undertakes to act according to a best-interest standard may be forced to make decisions concerning the client's mental capacity that the attorney is unqualified to make

Terminating the Relationship

I. Termination by the Client

a. Although clients can terminate the relationship with very few limits, there are some limits:
    i. Laws that protect employees against discrimination or retaliatory discharge may also protected employed lawyers
        1. And an employed lawyer may be able to invoke the Rule 1.6(b)(5) exception to confidentiality to prove such a case
    ii. Indigent criminal defendants may not fire the lawyers who have been appointed to represent them, although they may ask the court to assign a new lawyer or may choose to represent themselves
    iii. Even a litigant with a retained lawyer may not be permitted to fire counsel close to or during trial
        1. By then, the interests of others – the courts and the opponent – in not delaying trial will be given substantial weight

b. When a client fires a lawyer, the client may still be liable to the lawyer for fees earned up to the time of termination
    i. Whether the client is liable (and for how much) may depend on:
        1. Whether the termination was for cause (i.e., whether the lawyer did something to justify the client's decision)
        2. The contract between the parties, if there is one
        3. Whether the lawyer was working on a contingent basis

c. When a professional relationship ends, whether terminated by the lawyer or the client, or simply at the end of the matter, the client is presumptively entitled to the lawyer's entire file on the represented matter
    i. However, narrow exceptions will entitle the lawyer to keep firm documents intended for internal law office review and use
    ii. Some courts hold that a firm might refuse discovery where disclosure would violate an attorney's duty to a third party or where the document assesses the client himself or includes tentative preliminary impressions of the legal or factual issues

II. Termination by the Lawyer

a. Rule 1.16: Declining or Terminating Representation
    i. (a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
        1. (1) the representation will result in violation of the rules of professional conduct or other law;
        2. (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
        3. (3) the lawyer is discharged
    ii. (b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

1. (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
2. (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
3. (3) the client has used the lawyer's services to perpetrate a crime or fraud;
4. (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
5. (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
6. (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
7. (7) other good cause for withdrawal exists

iii. (c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

iv. (d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law

b. Leaving a client without a good reason can be characterized as abandonment, which is disloyal and has consequences
   i. Ex: In Texas, a lawyer who abandons a client loses all right to compensation (despite the trial court's permission to withdraw)
c. Both the Code and the Rules recognize permissive withdrawal for "professional" reasons
   i. These authorities not only allow the lawyer to get out of the representation, they allow the lawyer to threaten to get out
   ii. Further, a lawyer may withdraw for the reasons cited even if the withdrawal will have a material adverse effect on the interests of the client (Gillers)
d. Pettit: If the client isn't materially adversely affected, it looks like the lawyer can withdraw for pretty much any reason
   i. Case law suggests that usually Rule 1.16(b)(1)'s "without material adverse effects" applies to all of the other Rule 1.16 reasons too
   ii. **How to Analyze** → black letter law would go according to the structure of the rule – so can withdraw if (1) *or* (2) *or* (3) *or* (4), etc.; <u>but</u>, some courts look initially to material adverse effects and if that is satisfied, they may not look any further and deny withdrawal

III. <u>Termination by Drift</u>
   a. Does the end of the work necessarily mean the end of the professional relationship?
      i. If the relationship is not over, the lawyer may have a duty to continue to protect the client's legal interests
      ii. Duties under conflict rules are also greater when a client is current rather than former
   b. Episodic Clients
      i. Lawyers might believe that a client is no longer a client if they are doing no work for the client at the moment and haven't for quite a while, but this is not necessarily true since courts recognize "episodic clients"
         1. Ex: a firm may have done work for a client two or three times a year for the past few years, creating a reasonable client expectation that the professional relationship continues during the intervals
      ii. Lawyer might consider sending a "Dear Client" letter re: our relationship has concluded

1. But lawyers don't want to send these because they want future business

Lawyers, Money, and the Ethics of Legal Fees

The Role of the Marketplace

I. Ex: *Brobeck v. Telex* (U.S. 1979): Telex alleges that the law firm contract for a payment of $1M under certain circumstances was unconscionable, even though they agreed to it; law firm points to the clear language of the contract and Telex's consent; **court decides that contract was not unconscionable** – sophisticated parties, Telex got a lot of value out of the relationship, and Telex was the one that wanted a pre-determined fee (despite law firm wanting to determine the fee after they knew how much and what type of work would be completed)
   a. The contract between Telex and Brobeck was not so unconscionable that "no man in his senses and not under a delusion would make on the one hand, and as no honest and fair man would accept on the other"
      i. This is not a case where one party took advantage of another's ignorance, exerted superior bargaining power, or disguised unfair terms in small print
   b. Court also notes that whether a contract is fair or works an unconscionable hardship is determined with reference to the time when the contract was made and cannot be resolved by hindsight
      i. But Gillers suggests that we can't really think that we're *never* going to judge the reasonableness of legal fees by looking at the time of contracting only
         1. For example, what if client was charged because the prosecutor got the name wrong, and they actually shouldn't have been – can't expect that the full fee will be paid

II. Time or Value (or Does Value = Time?)
   a. If we omit personal injury cases, where contingent fees predominate, **hourly billing** is probably the most common way lawyers charge for their services and certainly time is the most common ingredient in determining a fee
      i. Some suggest that hourly billing promotes inefficiency and penalizes productivity (argument for value billing)
   b. Also common, in simple matters, are **flat fees**, which individual clients might prefer because they will know upfront what representation will cost them
   c. **Value Billing** = lawyers get paid for what they accomplish, rather than how long it took them to do it, broadly speaking
      i. Contingent fees are the most common example of value billing
      ii. The value-billing debate appears when courts award fees to prevailing parties under fee-shifting statutes
         1. Courts routinely use a multiple of time and hourly rate to determine a fee, but sometimes this can result in a fee way in excess of the client's recovery, which in turn leads some critics to question the logic of the policy
            a. Ex: *City of Riverside v. Rivera* (U.S. 1986): under a federal fee-shifting statute that authorizes federal judges to award "reasonable" fees to parties who prevail on certain federal civil rights claims, the lawyers were awarded fees in excess of $245,000; the party's recovery at trial was $13,300
               i. In dissent, Rehnquist notes that it is per se unreasonable if the fee is larger than what the client is going to get
               ii. Perhaps it is justified because civil rights victories cannot be monetized – there is a public interest victory, above and beyond the individual plaintiff's actual recovery

Unethical Fees

I. **Rule 1.5(a)**: A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the ***reasonableness*** of a fee include the following:
    a. (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly;
    b. (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
    c. (3) the fee customarily charged in the locality for similar legal services;
    d. (4) the amount involved and the results obtained;
    e. (5) the time limitations imposed by the client or by the circumstances;
    f. (6) the nature and length of the professional relationship with the client;
    g. (7) the experience, reputation, and ability of the lawyer performing the services; and
    h. (8) whether the fee is fixed or contingent

II. Ex: "What Are You Worth?": arguments on both sides; Rule 1.5, comment [1]: "… fees that are reasonable *under the circumstances* …"

III. Ex: *Matter of Laurence S. Fordham* (Mass. 1997): attorney took on a DUI case, which he was not familiar with, and ended up charging the client $50,000 because of the time and expense it took him to educate himself on the subject matter, among other things
    a. Attorney's strongest arguments:
        i. He had to educate himself on the subject and the client knew this
        ii. He had a novel theory that got the BAC suppressed
        iii. Good faith – he worked the time he said he worked, and the hourly fee was not unreasonable
    b. Bar's strongest arguments:
        i. Time that was spent was excessive – time to education should not adversely affect the client
        ii. Expert testified that this was not a tough case
        iii. Expert testified that DUI cases are nowhere near $50,000
    c. Court:
        i. We are not unmindful of the novel and successful motion to suppress the BAC, but that effort cannot justify a $50,000 fee in a type of case in which the usual fee is less than one-third of that amount
        ii. Attorney's inexperience in criminal defense work and DUI cases in particular cannot justify the extraordinarily high fee
            1. It cannot be said that an inexperienced lawyer is entitled to charge three or four times as much as an experienced lawyer for the same service
        iii. A lawyer generally should not accept employment in any area of the law in which he is not qualified
            1. However, he may accept such employment if in good faith he expects to become qualified through study and investigation, as long as such preparation would not result in unreasonable delay or expense to his client
        iv. Despite attorney's disclaimers concerning his experience, client did not appear to have understood in any real sense the implications of choosing this attorney to represent him
            1. Attorney did not give client any estimate of the total expected fee or the number of $200 hours that would be required
                a. Client did not enter the agreement "with open eyes"

IV. Discipline is not the only risk faced by lawyers who charge excessive or otherwise unethical fees
    a. Courts may order a reduction of the fee or deny a fee altogether

V. Fee Agreements In Writing?
    a. **Rule 1.5(b)**: The scope of representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, *preferably in writing*, before or within a reasonable time after commencing the representation, except when the lawyer will

charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client

i. Fee agreements, therefore, do not have to be in writing, but it is preferable and a good idea

b. **Rule 1.5(c)**: . . . A contingent fee agreement *shall be in writing* signed by the client and shall state the method by which the fee is to be determined . . .

VI. ABA Formal Opinion 93-379: Billing for Professional Fees, Disbursements, and Other Expenses

a. Situation #1: A lawyer finds it possible to schedule court appearances for three clients on the same day; he spends a total of four hours at the courthouse, the amount of time he would have spent on behalf of each client had it not been for the fortuitous circumstances that all three cases were scheduled on the same day

i. ABA would not allow a lawyer to charge all three clients for the four hours

1. The practice of billing more than one client for the same time is contrary to Rule 1.5

a. So if you are charging by the hour, you cannot bill more than one client for that hour

b. Situation #2: A lawyer is flying cross-country to attend a deposition on behalf of one client, expending travel time she would ordinarily bill to her client; and she decides not to watch a movie, but instead to draft a motion for another client

i. ABA would apply the same hard and fast rule: cannot bill more than one client for the same hour

ii. Argument that this disincentivizes productivity

c. Situation #3: A lawyer researches a particular topic for one client that later turns out to be relevant to an inquiry from a second client

i. ABA would apply the same hard and fast rule

1. Client benefits from the fact that the work was done previously

a. Ex: templates saved on a law firm server

d. Note: Even if this was all explained in advance and we had the informed consent of the client, the ABA would not likely change their stance

VII. Nonrefundable Fees & Liquidated Damage Clauses in Retainer Agreements

a. Ex: *Matter of Cooperman* (N.Y. 1994): use of a special nonrefundable retainer fee agreement clashes with public policy because it inappropriately compromises the right to sever the fiduciary services relationship with the lawyer; *but* minimum fee arrangements and general retainers that provide for fees, not laden with the nonrefundability impediment irrespective of any services, will continue to be valid and not subject in and of themselves to professional discipline

i. The Code of Professional Responsibility mandates that an attorney shall not enter into an agreement for, charge, or collect an illegal or excessive fee, and upon withdrawal from employment shall refund promptly any part of a fee paid in advance that has not been earned

ii. The unqualified right to terminate the attorney-client relationship at any time has been assiduously protected by the courts

1. If a client exercises the right to discharge an attorney after some services are performed but prior to the completion of the services for which the fee was agreed upon, the discharged attorney is entitled to recover compensation from the client measured by the fair and reasonable value of the completed services

iii. Rule: If you have a fee for specific services that are not performed, it has to be refundable

iv. DO NOT read *Cooperman* as the law everywhere (because it isn't)

1. Gillers agrees that *Cooperman* was rightly decided on its facts – the fees were unreasonable – but disagrees with making a categorical statement that nonrefundable fees for specific services are always unreasonable

b. The question of nonrefundable fees is inextricably bound up with the question of what a lawyer may ethically sell

i. Minimum Fee
ii. General Retainer (fee given in exchange for availability – a charge separate from fees incurred for services actually rendered)
iii. Special Retainer

c. Ex: "Meet Sara Bennet": $10K for her promise of availability (maybe a general retainer); $24K as a minimum (nonrefundable) fee against the first thirty hours of Sara's time (maybe a minimum fee)
    i. $10K will likely satisfy *Cooperman*; $24K will likely not satisfy *Cooperman*
    ii. Might argue that a fee is not unreasonable (and therefore in line with Rule 1.5) if it is fully explained and understood and the client goes ahead anyways
        1. But, not all bar committees would accept this explanation
d. Ex: *McQueen v. CITGO* (Okla. 2008): arrangement at issue was one in which the firm would handle specified work for CITGO for four years for a fixed annual fee and do other work according to a fee schedule; the agreement provided for liquidated damages in the event that CITGO chose to terminate the firm; CITGO now alleges that the liquidated damages provision interfered with its absolute right under Rule 1.16(a)(3) to discharge its lawyers
    i. Court upholds the clause, so long as it is not considered a penalty
        1. Fees set out were reasonable
        2. Contract was negotiated with a sophisticated client and the retainer agreement contains an agreement by the client to compensate the lawyer if the client terminates the relationship
        3. Contract was in writing with a clear statement of the consequences of the provision
        4. Attorney changed positions and/or incurred expenses to meet the needs of the client
            a. Detrimental reliance argument
    ii. Dicta: This agreement would <u>not</u> likely have survived in the *Cooperman* court
e. Is there a difference between liquidated damages clauses and nonrefundable fee agreements or is it just semantics?
    i. I think there is a difference – liquidated damages clauses are more upfront and expectations should be managed; but it does seem to restrict the right to terminate the lawyer; maybe sophisticated clients are presumed to have gone through a balancing process before agreeing to the provision

Contingent Fees

I. **Rule 1.5(c)**: A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement <u>*shall*</u> *be in a writing* signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.
II. In a contingent fee agreement, a lawyer's fee depends on the occurrence or nonoccurrence of an event
    a. Usually, the event is recovery of a sum on money, and the fee is a percentage of the recovery
        i. Or a lawyer may agree to a percentage of the amount of money he saves the client
III. Contingent fees are conceptually possible in all representatives that have a definable objective
    a. But they are generally <u>forbidden</u> in criminal and matrimonial cases
IV. From the lawyer's perspective, the contingent fee will sometimes enable her to have a client when otherwise she would not, either because the client cannot afford a traditional fee or because the client is unwilling to invest money in her claim

a. Whether a contingent fee is more favorable to the lawyer than an hourly fee ordinarily depends on five factors:
    i. The likelihood of the occurrence of the contingency
        1. Usually the most important factor
            a. If the contingency does not occur, the lawyer does not get paid (although the client may be responsible for the lawyer's out-of-pocket costs)
                i. Unless it is a "hybrid" fee
    ii. When the contingency is likely to occur
    iii. The probable size of the recovery
    iv. The amount of work required
    v. The size of the lawyer's percentage

V. From the client's perspective, a contingent fee gives a lawyer incentive
    a. Counter: the lawyer's financial interest in the client's recovery warps the lawyer's judgment and leads to frivolous litigation

VI. **Rule 1.5(d)**: A lawyer <u>shall not</u> enter into an arrangement for, charge, or collect:
    a. (1) any fee in a *domestic relations matter*, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or
        i. Why?
            1. Original argument was that lawyer might not be focused on reconciliation, if it is possible, and historically divorce was seen as bad for society – we don't want to reward lawyers for successfully getting clients divorces
            2. State has an interest in seeing as much money stay with the family as possible
            3. Since the law empowers the judge to order a wealthier spouse to pay the other spouse's counsel fees, the less wealthy spouse does not need a contingent fee to be able to attract a lawyer
            4. A contingent fee gives the lawyer a stake in the outcome that might lead to a recommendation of a course of action not in the client's best interests
    b. (2) a contingent fee for representing a defendant in a *criminal case*
        i. Why?
            1. Lawyer and client interests could conflict
                a. Ex: lawyer might advise against plea bargains, if the fee is contingent upon winning a trial

VII. Are Contingent Fees Good?
    a. Argument for → give ordinary people access to the courts for legitimate claims (who might not otherwise have been able to afford an attorney)
    b. Argument against → lead to frivolous litigation
    c. English System = no contingent fees, but lawyers' fees are paid by the loser
        i. vs. American System = allows contingent fees, but generally each side pays for their own attorneys
    d. California's Referendum: "A plaintiff's lawyer in individual tort cases must make a settlement demand within 60 days of being retained. The defendant may respond with an offer. If it does not, this rule is inapplicable. If the defendant does make an offer and it is accepted, the contingent fee is limited to 15 percent of the settlement. If the offer is not accepted, the contingent fee for any ultimate recovery, by settlement or trial, is 15 percent of the amount of the rejected offer and the lawyer's usual percentage for any excess"
        i. Difference from a straight contingency fee: the difference goes to the client
        ii. Purpose: encourage settlements and not give lawyers money that they did not earn

VIII. Ex: "Petra Bento's Hybrid Fee Agreement": lawyer purports to only charge for work she actually did, but she switches from a contingency fee to an hourly fee if the client accepts a low settlement offer against the lawyer's advice

a. Might be construed as a negative incentive for the client to settle – and we know the client ultimately has this right
    i. At the least it puts pressure on the client to make a decision based on other things than the merit of the settlement offer

Minimum Fee Schedules

I. Ex: *Goldfarb v. Virginia State Bar* (U.S. 1975): petitioners brought this suit against the State Bar alleging that the operation of the minimum-fee schedule, as applied to fees for legal services for real estate transactions, constituted price fixing in violations of §1 of the Sherman Act; court holds that (i) lawyers are within the reach of the Sherman Act, and (ii) the mandatory minimum fee schedule is a restraint of trade
    a. First, was there price fixing?
        i. Yes – this minimum fee schedule was not merely advisory, it was mandatory
            1. If you did not follow the schedule, you would be subject to discipline by the Bar
    b. Second, if so, are their activities in interstate commerce/do they affect interstate commerce?
        i. Yes
    c. Third, if so, are the activities exempt from the Sherman Act because they involve a "learned profession" (i.e., are not "trade or commerce")?
        i. No – Congress was trying to create a broad statute and SCOTUS does not think Congress intended to exempt learned professions
            1. "Lawyers play an important part in commercial intercourse, and anticompetitive activities by lawyers may exert a restraint on commerce"
    d. Finally, if not, are the activities "state action" and therefore exempt from the Sherman Act?
        i. No

II. Post-*Goldfarb*, not only may lawyers undersell the competition, they may announce their lower fees to the entire community (because of lawyer advertising cases)

III. Ex: *Bates v. State Bar of Arizona* (U.S. 1977): SCOTUS rejected the claim that Arizona's prohibition on legal advertising violated the Sherman Act, and consequently the action was shielded from the antitrust laws; however, the Court ultimately held that the restrictions were unconstitutional under the First Amendment
    a. Any relationship between *Goldfarb* and *Bates*?
        i. *Goldfarb* holds that Bars associations cannot fix fees, but how do potential clients know who is charging less unless lawyers can advertise?
            1. Therefore, some people say that *Goldfarb* doesn't mean anything without *Bates*

Mandatory Pro Bono Plans

I. **Rule 6.1: Voluntary Pro Bono Publico Service**: Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer *should aspire* to render at least (50) hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:
    a. (a) provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to:
        i. (1) persons of limited means or
        ii. (2) charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means; and
    b. (b) provide any additional services through:
        i. (1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;
        ii. (2) delivery of legal services at a substantially reduced fee to persons of limited means; or

iii. (3) participation in activities for improving the law, the legal system or the legal profession
- In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means

c. Comment [12]: The responsibility set forth in this Rule is <u>not</u> intended to be enforced through disciplinary process

II. For Law Firms:
a. Pros:
i. There is a great need for legal services
1. Often people cannot afford legal services, so there is a large group of people whose legal needs go unmet
ii. As a legal profession we erect barriers to prevent lay people from practicing law, so pro bono is effective, even if the lawyer is not specialized in that area
1. Notion that it is better for an attorney to offer legal assistance (who may not be specialized) than a lay person to try and navigate the law and represent themselves
iii. Pro bono should not be thought of as simply a philanthropic exercise – it is a professional responsibility
iv. Such requirements would support lawyers who want to participate in public-interest projects but work in organizations that have failed to provide adequate resources or credit for these efforts
b. Cons:
i. Concerns about the quality of the services provided pro bono
1. Notion that the lawyer might lack a certain expertise
a. So this might not be the best allocation of resources
b. Clients could suffer as a result
ii. How do we define what constitutes pro bono hours, if they are indeed mandatory?
1. Too broad
2. Too narrow
iii. Even with a substantial expenditure of resources, it would be extremely difficult to verify the amount of time that practitioners reported for pro bono work or the quality of assistance they provided
iv. Moral arguments against mandatory pro bono (although not all find this persuasive)
1. It is not charity for the public good if you are forced to do it
2. Involuntary servitude

III. For Law Schools:
a. Pros:
i. Creates a spirit of public service, idealistically
ii. Students might be considered more trained and able by employers because of this practical, real-world experience
b. Cons:
i. Time constraints for law students by adding an additional requirement
ii. Might create more problems than benefits, as far as administering the program, e.g.

Conflicts of Interest

<u>Concurrent Conflicts of Interest</u>

Introduction

I. **RST**: A conflict of interest is involved if there is a *substantial* risk that the lawyer's representation of the client would be *materially and adversely* affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person

II. Rule 1.7: Conflict of Interest: Current Clients

a. (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
    i. (1) the representation of one client will be directly adverse to another client; or
    ii. (2) there is a *significant* risk that the representation of one or more clients will be *materially* limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer
b. (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client *if*:
    i. (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
    ii. (2) the representation is not prohibited by law;
    iii. (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; **and**
    iv. (4) each affected client gives informed consent, confirmed in writing
        1. So this is only consentable if (1) – (3) are also satisfied

III. Even if there were no lawyer ethics codes, lawyers would be subject to conflict rules under the law of agency and the law of fiduciary duty
    a. Lawyer ethic rules happen to provide greater specificity for the operation of conflict rules as they apply to the work of lawyers, but the law of agency and fiduciary duty are not displaced

IV. Most conflict rules do not contain a mens rea requirement – they are absolute liability rules
    a. A lawyer may violate them unintentionally through lack of awareness, or even believing, erroneously but in good faith, that she was acting properly
    b. Major Exception: imputed conflicts – a conflict that arises only because the conflict of a colleague in a firm is imputed to other lawyers in that firm
        i. Rule 1.10(a) forbids a lawyer *knowingly* to accept certain work that a conflicted colleague would have to decline

V. Typology
    a. Current Client Conflicts
        i. In a concurrent conflict situation, the lawyer may find her loyalties divided between two or more *current* clients – clients she is then representing
        ii. Concurrent conflicts need not be between or among current clients – the lawyer may have personal interests that pose a loyalty threat
        iii. Primary Rule = 1.7
    b. Former Client Conflicts
        i. *Successive* conflicts (as opposed to concurrent) are those between a former client and a current client
            1. Primary concern is misuse of confidential information
                a. Also concerned about the duty of loyalty, which survives the attorney-client relationship (in at least some ways)
        ii. Primary Rule = 1.9
    c. Imputed Conflicts
        i. Rules 1.10, 1.11, 1.12, and 3.7
    d. Government-Lawyer Conflicts
        i. Rule 1.11
    e. Lawyer-Witness Conflicts
        i. Rule 3.7 → A lawyer cannot occupy both roles
    f. Organizational Lawyer Conflicts
        i. Conflicts can arise when a lawyer represents an entity but deals with the entity through its officers and employees
        ii. Conflicts can develop if the lawyer is deemed to represent both the entity and its agents if their interests happen to diverge

VI. Policy

a. The *broader* the rules and the greater the number of matters that a lawyer or the lawyer's firm will be forbidden to accept, the greater the number of clients who will be denied counsel of choice, and the greater the disincentive for lawyers to specialize in a narrow area of law or the problems of a specific industry (because the client base will be smaller)
b. The *narrower* the rules the less protection they will afford clients, who may suffer (or believe they will suffer) from a breach of confidentiality or an act of disloyalty

VII. Informed Consent Issue
a. When we're talking about getting informed consent, don't we have to worry about confidentiality? Do we need to satisfy a waiver of the confidentiality rule?
i. Pettit thinks this is an issue and there is no rule that suggests you can reveal confidential information when you are trying to address conflict issues … but otherwise, no real good answer

Client-Lawyer Conflicts

I. Business Interests
a. **Rule 1.8(a)**: A lawyer <u>shall not</u> enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client *unless*:
i. (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
ii. (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
iii. (3) the client gives informed consent, in a writing signed by the client, 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
b. Ex: *Matter of Neville* (Ariz. 1985): attorney does a real estate deal with a client; attorney argues (a) Bly is not a client in this matter, (b) Bly was very sophisticated and he was the one who dictated the terms of the deal, and (c) he made full disclosure and obtained voluntary, informed consent; court doesn't buy any of these arguments
i. Conflict rules are <u>not</u> limited to those situations in which the lawyer is acting as counsel in the very transaction in which his interests are adverse to his clients
1. They apply also to transactions in which, although the lawyer is not formally in an attorney-client relationship with the adverse party, it may fairly be said that because of other transactions an ordinary person would look to the lawyer as a protector rather than as an adversary
a. Similar to the episodic client notion – it is natural and proper for a client with a longstanding business relationship with a lawyer to feel that the lawyer is to be trusted, will not act unfairly, and will protect him against danger
ii. <u>"I am not representing you in this matter" ≠ full disclosure</u>
1. Full disclosure to a lay client necessary for *informed* consent requires not only that the lawyer make proper disclosure of nonrepresentation, but that he also disclose every circumstance and fact which the client should know to make an intelligent decision concerning the wisdom of entering the agreement
a. The lawyer must give the client that information which he would have been obliged to give if he had been counsel rather than interested party, and the transaction must be as beneficial to the client as it would have been had the client been dealing with a stranger rather than with his lawyer
i. Note: Pettit does not think all courts would go this far, but is it a warning of the risks of doing business with your current/former clients – it is a temptation you usually want to resist
c. A Lawyer's Financial Interests

i. Deals with Clients → A lawyer's financial deal with a current client is subject to the substantive and procedural requirements of Rule 1.8(a), intended to protect the client
ii. Interests Adverse to Clients →A lawyer may have business or financial interests with others that create a personal conflict with the interests of a client within the meaning of Rule 1.7(a)(2)
1. Exs: pg. 226-227

d. Ex: "Lawyer. Realtor. Any Problem?": lawyer has a real estate license and wants to do brokering along with lawyering for the same client – can she?
i. There may be exposure under Rule 1.7(a)(2)
1. What if the brokering side wants to go forward, but the lawyering side does not
ii. Before advising her, we should consult Rules 1.7 and 1.8 – both dealing with current client conflicts

e. Ex: "My Opponent's Firm is an Occasional Client": law firm is representing P against D, and D's counsel is an occasional client of the firm representing P – but the matters are wholly distinct
i. Question whether D's firm is a former or current client of P's counsel's firm
1. Former – no pending malpractice claims or litigation pending
2. Current – notion of the episodic client
a. Courts may resolve any doubts in favor of the client
ii. Rule 1.7(a)(2) is at issue, and there is some possible exposure
1. P's firm might not want to upset D's firm because they want to keep their business
2. D's firm might not want to upset P's firm because they want to use them again in the future
iii. Pettit thinks that P's firm can get informed consent in this situation, provided it is done correctly

II. Media Rights
a. Rule 1.8(d) forbids lawyers to acquire publicity rights to a story based on the subject of the representation before its conclusion
i. Informed consent is <u>not</u> a way around this rule
ii. If the defendant is convicted, she may seek to vacate the conviction on the ground that the lawyer's possession of the media rights created an impermissible conflict of interest leading to denial of the effective assistance of counsel guaranteed by the Sixth Amendment
1. This is because the lawyer's media rights will be more valuable if there is a trial (whatever the verdict) than if the client takes a plea, so the lawyer's incentives are skewed in favor of going to trial

III. Financial Assistance and Proprietary Interests
a. Contingent fees give a lawyer a direct interest in the client's cause, yet they are permitted (though regulated), often on the ground that less wealthy clients would not otherwise be able to afford to retain a lawyer
b. Other provisions of the Rules, however, place strict limits on the ability of a lawyer to have other kinds of direct or indirect interests in a client's case
i. **Rule 1.8(e)**: A lawyer <u>shall not</u> provide financial assistance to a client in connection with pending or contemplated litigation, except that:
1. (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and
a. This does <u>not</u> include living and medical expenses
2. (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client
ii. Why is there an absolute ban in Rule 1.8(e) on financial assistance to a client in connection with pending or contemplated litigation, but no bar at all if the client's matter is not litigation?

1. Gillers is not convinced about this rule and thinks that permitting lawyers to advance living costs would enable poorer plaintiffs to endure the procedural maneuvers of wealthy defendants, who might use delay to win a favorable settlement

iii. Policy → An important public policy interest is to avoid unfair competition among lawyers on the basis of their expenditures to clients
1. Clients should not be influenced to seek representation based on the ease with which monies can be obtained, in the form of advancements, from certain law firms or attorneys
2. There is also a concern about the client's ability to exit the attorney-client relationship if they are dependent on it for their living expenses

IV. Fee-Payer Interests
a. Lawyers may sometimes get paid by one person to represent another person
i. Rules 1.8(f) and 5.4(c) permit these payments under certain circumstances:
1. The client must consent to the arrangement
2. The payor must not interfere with the lawyer's independence of professional judgment or with the client-lawyer relationship
3. The lawyer must protect the client's confidences
a. It must be clear that the lawyer is representing the person with the legal problem – <u>not</u> the payor
b. And the lawyer should be aware, and make the fee payor aware, that the fact and amount of payment will not likely be privileged

b. Conflicts/Concerns
i. When an employer pays for an employee's legal services
1. At some point in the litigation, their interests may diverge

ii. Ex: *Matter of Maternowski* (Ind. 1996): lawyers representing V had a policy against representing clients who wanted to cooperate with the government by providing information against others in exchange for leniency; the court found that it was "a reasonable possibility" that the individuals who had hired the defense lawyers to represent V were her accomplices and that they did so for the very reason that under their established policy, the lawyers would include V to not implicate the accomplices
1. The convergence of the non-cooperation policy and the reasonable possibility that attorneys' fees were being paid by accomplices, impermissibly conflicted with the independence of the respondents' professional judgment
a. Violation of Rules 1.7(b) and 1.8(f)
b. Lawyers were suspended for 30 days
2. Hard to justify this non-cooperation policy – seems worse that the "I don't plea bargain" (unless there is a shadow counsel)

V. Related Lawyers, Significant Others, and Friends
a. Rule 1.7, Comment [11]: When lawyers representing different clients in the *same* matter or in *substantially related* matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer related to another lawyer, e.g., as parent, child, sibling or spouse, ordinarily may <u>not</u> represent a client in a matter where that lawyer is representing another party, *unless* each client gives informed consent. The disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated
b. Ex: *Gellman v. Hilal* (N.Y. 1994): <u>there is no per se rule of disqualification based on marital status</u>, despite the fact that there may be a financial incentives (re: the family's income)
i. A lawyer whose husband or wife is also a lawyer must, like every other lawyer, obey all disciplinary rules

1. We cannot assume that a lawyer who is married to another lawyer necessarily will violate any particular disciplinary rule, such as those that protect a client's confidences, e.g.

ii. Court does not appear to suggest that the marital relationship needs to be disclosed
1. California requires disclosure though
2. Q re: what relationships would require disclosure – blood, marriage, intimate?

iii. Policy reason for <u>not</u> imputing conflicts between spouses → courts could effectively preclude married lawyers from practicing in the same communities as their spouses

VI. A Lawyer's Legal Exposure
a. Ex: "The Client Says We Messed Up": law firm is representing a company, GC of company tells firm's partner that the firm messed up on some part of the deal but it is too late to fire them so they need to finish, GC of company might sue law firm when the deal is over – can law firm continue to work on the deal? Is there a conflict?
i. The potential conflict of interest is in Rule 1.7(a)(2) – the law firm has a personal interest in not being sued for malpractice
1. Law firm might not have independent judgment as to whether the deal should go through or not because of their interest

ii. Current conflicts may be curable under Rule 1.7(b)
1. Is the law firm capable of getting informed consent from their client here?
a. We are not sure how this is going to play out (i.e., whether and what the conflicts will be in the future)

iii. We would want outside counsel to investigate to avoid Rule 1.10 imputation for a future malpractice case
1. Information gathered in the investigation (as to whether there is malpractice exposure) would have to be communicated to the client – the facts
a. But the communications to outside counsel would be protected

b. When a government witness alleges that the defendant's counsel engaged in criminal conduct related to the charges for which the defendant is on trial, it creates one of two actual conflicts
i. First, if the allegations are true, the attorney may fear that a spirited defense could uncover convincing evidence of the attorney's guilt or provoke the government into action against the attorney
1. Moreover, the attorney is not in a position to give unbiased advice to the client about such matters as whether or not to testify or to plead guilty and cooperate since such testimony or cooperation from the defendant may unearth evidence against the attorney

ii. Second, even if the attorney is demonstrably innocent and the government witness's allegations are plainly false, the defense is impaired because vital cross-examination becomes unavailable to the defendant
1. An attorney cannot act both as advocate for his client and a witness on his client's behalf
a. And, in questioning a witness concerning his allegations against the attorney, the attorney effectively becomes an unsworn witness

c. Therefore, the attorney cannot continue representation
i. Unless the trial court can definitively rule out that the lawyer was not actually involved

VII. Gender, Religion, Race
a. Ex: "Karen Horowitz's Dilemma": Karen's interests in wanting to continue working on the case and not to be discriminated against because of her religion are in conflict with the client's interest in appealing to the jury make-up of the jurisdiction
i. Can't we put client interests first, but do so only as long as it does not involve discrimination?
ii. Is anti-Semitism and other bias just a reality of the world?

Client-Client Conflicts

I. Civil Cases

a. Ex: "Will You Represent Us Both": can attorney represent two plaintiffs who are suing their employer on the basis of discrimination based on their national origin and race? (so clients themselves are causing the conflict)
    i. Need to know what the remedy is
        1. If they are both seeking monetary damages, then the attorney might be able to make the same arguments for both PS
        2. If they are both seeking the same job, it is harder to the attorney to effectively argue for both
    ii. Valid concern that they cannot otherwise secure a lawyer
    iii. Can we get informed consent?
        1. Disclose that for now I can represent you both, but down the road I may not be able to
            a. Or do we say that the dangers of conflict is too high – despite the parties' wishes to continue with the same lawyer
        2. Model Rules do not give a lot of guidance → Rule 1.7(a)(2)
    iv. SAFEST PATH: represent only one . . . but lawyers want to make a living and clients want the lawyer, despite the possible conflicts
b. Ex: "May We Do Both Cases?": example of ***issue conflict***
    i. Rule 1.7(a)(2), Comment [24]: "Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest
        1. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client
            a. <u>Factors</u> relevant in determining whether the clients need to be advised of the risk include:
                i. Where the cases are pending (a WI decision is not binding precedent for a CA court, e.g.)
                ii. Whether the issue is substantive or procedural
                iii. The temporal relationship between the matters
                iv. The significance of the issue to the immediate and long-term interests of the clients involved
                v. The clients' reasonable expectations in retaining the lawyer
        2. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters"
    ii. Full disclosure and informed consent from both clients likely takes care of this problem
        1. To get informed consent, likely give the clients the worst case scenario – that representation may be limited to the lower federal courts because if the cases go to SCOTUS, can only represent one – but explain that the conflict is very remote, e.g.
c. Ex: *Fiandaca v. Cunningham* (1st Cir. 1987): petitioners seek disqualification because NHLA had an irresolvable conflict in that their duties to the class in *Garrity* would hurt the settlement in this current litigation – they cannot give independent, unbiased legal advice about the settlement because they have divided loyalties; Rule 1.7(a)(2) is the relevant rule; court finds that NHLA does have an irresolvable conflict; remedy: disqualification of NHLA, *but* trial court will <u>not</u> start all over because this conflict did not necessarily affect the entire trial – conflict entered during the settlement phase – so new counsel will start from the remedy phase

i. Note: This is <u>not</u> Rule 1.7(a)(1) because their interests are not directly adverse – they are only adverse with respect to the settlement offer
    1. 1.7(a)(1) is construed relatively narrowly (*See* Rule 1.7, Comment [6])
ii. Should the opposing party be able to make a motion to disqualify an opponent's lawyer?
    1. It could be tactical/strategic (cynical view)
    2. It could be to resolve the issue now, rather than figuring out the conflict after the case is over and possibly start the trial all over again (optimistic view)
    3. The First Circuit has generally recognized non-client standing to raise an opposing lawyer's conflict
        a. This rule is predicated on the assumption that it is the duty of every lawyer to call a court's attention to another lawyer's violation of conflict rules
        b. *But* the First Circuit is in the **minority** here (in their generous standing rule)
iii. Concerns about who will represent these plaintiffs if New Hampshire Legal Aid cannot
    1. Some courts have said that with respect to a <u>public defender's office</u>, they will not impute conflicts on the assumption that the relationship of public defenders to their office is not the same as the relationship between a private lawyer to her firm
        a. A public defender's office, unlike a private firm, will have no reason to favor one client over another
        b. The lawyer's themselves have no financial incentive to prefer one client over another
        c. Indigent clients are likely to get better counsel from the defender than from appointed counsel
        d. Paying outside counsel would be quite an expense for the taxpayers

d. Imputed Conflicts
i. With some exceptions, mainly in the areas of government law offices, former government lawyers, and successive representation, both the Code and the Rules impute client conflicts among all affiliated lawyers
    1. Rule 1.10(a)
ii. Lawyers are affiliated for imputation purposes if they work in the same office, regardless of their title
iii. ABA concluded that two firms, though practicing under different names, may be deemed one firm for conflict purposes if they promote themselves as "affiliated" or "associated"
iv. Sometimes law firms affiliate for a single matter, creating a "joint defense" or "common interest" arrangement
    1. Courts will not conclusively presume that the confidential information that required the disqualification of one firm was passed to other firms in the common interest arrangement
        a. The other firms will have an opportunity to prove they received no such information
v. Imputation has its limits
    1. Rule 1.10(a), which imputes Rule 1.7 and Rule 1.9 conflicts firmwide, excludes imputation when one lawyer's conflict is based on her personal interest if, in addition, there is no significant risk that the representation will be materially limited

e. Confidentiality and Privilege in Multiple Client Representations
i. <u>General Rule</u> → if you have a communication with a lawyer with a third party present, you waive the privilege

ii. Joint Representations → the general rule here is that communications between one common lawyer and the two clients in these situations retain their privileged status so long as the communications would have been privileged in the first place
    1. However, in the event of a dispute between the two clients, neither client will be able to assert the privilege for communications with the common lawyer
iii. *Eureka* Exception (to the principle that joint clients cannot assert privilege in a later dispute between them) → applies when the common lawyer should not have accepted or continued the joint representation in the first place, because of a conflict between the joint clients
iv. Common Interest Rule → the rule avoids loss of privilege for communications between lawyers or between any client and any lawyer in the common interest arrangement
    1. This is for situations where the third party shares an interest sufficiently common so they are not deemed a third party (and therefore the communication is still privileged)
        a. But the rule has varying degrees of application
    2. Note that communications between clients are not privileged

f. Class Conflicts
    i. These are conflicts within the class so that one lawyer could not represent all of the plaintiffs
        1. Conflicts within a class can occur concurrently or successively
        2. Ex: *Amchem v. Windsor* (U.S. 1997): court found a class conflict because the class consisted both of persons who had already manifested injuries from asbestos exposure and also those who had been exposed but had not yet become ill – the two groups had different interests

g. Malpractice Based on Conflicts
    i. Sometimes the remedy for a conflict of interest will be disqualification; sometimes discipline; sometimes malpractice liability and fee forfeiture
    ii. Ex: *Simpson v. James* (5th Cir. 1990): petitioners brought suit against the law firm that represented both the buyers and the sellers in the asset purchase; but liability may not be premised solely on the fact that an attorney represented both buyer and seller – after full disclosure by the attorney, it may be proper in some circumstances for an attorney to represent both sides in a real estate transaction (per the court)
        1. Court notes that an attorney-client relationship can form despite the fact that you do not give someone advice or charge them money
            a. Pettit notes that courts are quick to find an attorney-client relationship
        2. Even if there is an inappropriate conflict situation, that does not automatically lead to malpractice liability; and even if there is no conflict situation but you do not perform with reasonable competence, that could lead to malpractice liability
            a. A plaintiff in a malpractice action must prove four elements to recover:
                i. The defendant owed a duty to the plaintiff
                ii. The defendant breached that duty
                iii. The breach proximately caused the plaintiff injury
                iv. Damages resulted
    iii. **Rule 1.8(h)(1)**: A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement

h. Consent and Waiver
    i. Ex: "What Kind of Consent?": what we might tell the clients here – your interests are together now, but they may diverge and if they do, I cannot represent any of your because I will have confidential information and I would be suing a former client using

that confidential information; we'd probably also want to say something about confidentiality between the parties (i.e., if the musician says something, do we keep that confidential from the chef?); safest choice is to represent only one of them – everyone should have independent counsel; if you are going to represent all of them, have them sign written consents and before they sign to be advised by independent counsel – but note that since people cannot foresee the future, consents regarding the future are going to be more strictly scrutinized

ii. Rule 1.7 and the other conflict rules let clients consent to work that would otherwise be forbidden . . . but not all work, see Rule 1.7(b)
    1. Courts and rules require lawyers to explain the conflict to a client before accepting consent
    2. Rule 1.7 requires informed consent that is confirmed in writing
    3. RST and numerous courts recognize that a client's sophistication is a significant consideration in determining whether its consent to a conflict is adequate

iii. Clients *may* consent to conflicts in advance of their occurrence
    1. A blanket prospective consent can hardly be fully "informed" because the parties cannot then know what the future hold
        a. ABA has taken the position that some specificity is probably required and that if and when a conflict does arise, the lawyer must then make the independent judgment required by Rule 1.7 that the representation will not be adversely affected
        b. Comment to Rule 1.7 recognizes that a blanket advance consent can stand up if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, particularly if the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation

iv. Consent should be distinguished from waiver and estoppel
    1. Consent contemplates the client's conscious, informed agreement
    2. A client who has not consented may nevertheless waive a conflict depending on such factors as: (i) length of the delay in brining the motion to disqualify; (ii) when the movant learned of the conflict; (iii) whether the movant was represented by counsel during the delay; (iv) why the delay occurred; and (v) whether disqualification would result in prejudice to the non-moving party
        a. The court will also investigate whether the motion was delayed for tactical reasons
    3. Despite these technical distinctions, "waiver" is often used interchangeably with "consent"

i. Is There a Client-Lawyer Relationship?
    i. Courts are very quick to find the relationship exists
        1. Very seldom does the argument that there was no attorney-client relationship win
    ii. If the client reasonably believes that you are their lawyer, that is good enough
        1. Payment of a fee is not required

II. Criminal Cases (Defense Lawyers)
    a. Issues of concurrent conflicts between clients in criminal representation arise when a single lawyer represents two or more defendants or persons under investigation
        i. The conflicts issue may be raised, among other ways, if the defendant(s) are convicted and challenge the lawyer's performance as constitutionally ineffective
        ii. The conflicts issue arises in an inverted way when a defendant wants to hire a lawyer and the judge refuses to allow it (usually in response to an objection from the prosecutor) on the ground that the lawyer has a disqualifying conflict

1. The defendant may be fully prepared to waive any conflict and argue that denying him his chosen lawyer violates his Sixth Amendment right to counsel of choice
2. In turn, the prosecutor may argue that because of the conflict the lawyer cannot ethically represent the defendant or offer constitutionally effective representation

b. Ex: "Murder One, Murder Two": attorney is definitely conflicted here because one D wants to accept the plea bargain, which would require testifying against the other D, who wants to go to trial; attorney cannot represent both because to get the best deal for one requires implicating another
    i. Attorney does not owe either D a duty to endure a conflicted representation just because removing himself from the conflict could put one of the Ds at a disadvantage
        1. Effective assistance of counsel does not require conflicted counsel to proceed with the representation

c. Ex: *Cuyler v. Sullivan* (U.S. 1980): state prisoner claims that he was denied the effective assistance of counsel guaranteed by the Sixth Amendment because his lawyers had a conflict of interest
    i. *Holloway* – requires state trial courts to investigate timely objections to multiple representation
        1. A *Holloway* situation is one where the possibility of conflict is brought to the court's attention and the court fails to investigate the conflict
            a. This results in an automatic reversal, with <u>no</u> need to show prejudice
        2. This case is <u>not</u> a *Holloway* case because no one drew to the court's attention a conflict based on multiple representation
    ii. Must a state trial judge inquire into the propriety of multiple representation even though no party lodges an objection?
        1. No – <u>there is no independent obligation of judges to initiate inquiries themselves into the propriety of multiple representation in every case</u>
            a. Defense counsel have an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises during the course of trial
            b. Absent special circumstances, trial courts may assume either that multiple representation entails no conflict or that the lawyer and his clients knowingly accept such risk of conflict as may exist
    iii. Does the mere possibility of a conflict of interest warrant the conclusion that the defendant was deprived of his right to counsel?
        1. *Holloway* reaffirmed that multiple representation does not violate the Sixth Amendment unless it gives rise to a conflict of interest
            a. Since a possible conflict inheres in almost every instance of multiple representation, a defendant who objects to multiple representation must have the opportunity to show that potential conflicts impermissibly imperil his right to a fair trial
                i. But unless the trial court fails to afford such an opportunity, a reviewing court cannot presume that the possibility for conflict has resulted in ineffective assistance of counsel
        2. In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance
    iv. Concurrence (Brennan): the trial judge has a duty to ensure that defendants have not given up their right to effective assistance of counsel
        1. Therefore, the court has a duty to inform clients with joint representation of the hazards of having joint representation – initiate the colloquy

v. Concurrence/Dissent (Marshall): agrees with Brennan on the judge's duty to inquiry, but has an issue with the majority's standard of proof – it is unduly harsh and extremely speculative
    1. If there is an impermissible conflict, that should be enough
vi. Note: *Cuyler* was decided before *Strickland v. Washington* (U.S. 1984), which stated the test for determining ineffective assistance of counsel (but is not about conflicts)
    1. Test: whether counsel's performance "was reasonable considering all the circumstances"
        a. If not, the "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different"
vii. Note: In *Mickens v. Taylor* (U.S. 2002), SCOTUS decided that courts were applying *Holloway* too broadly
    1. Therefore, the automatic reversal rule operates only where defense counsel is forced to represent codefendants over his timely objection, unless the trial court has determined that there is no conflict
        a. Even if the judge knew or should have known about the conflict, the automatic reversal rule applies on if defense counsel brings up the conflict issue

d. Disqualification of Defense Counsel
i. Ex: *Wheat v. United States* (U.S. 1988): government objected to petitioner's proposed substitution on the ground that substitute counsel's representation of defendants created a serious conflict of interest; now petitioner wants a new trial because he was not allowed to use the lawyer he wanted to; court held that district court's refusal to permit the substitution of counsel in this case was within its discretion and did *not* violate petitioner's Sixth Amendment rights; district court must recognize a presumption in favor of petitioner's counsel of choice, *but* that presumption may be overcome not only by a demonstration of actual conflict but by a showing of a serious potential for conflict [actual – or – serious potential for conflict]
    1. **Where a court justifiably finds an actual conflict of interest, there can be no doubt that it may decline a proffer of waiver and insist that defendants be represented separately**
        a. The district court must be allowed substantial latitude in refusing waivers of conflicts of interest not only in those rare cases where an actual conflict maybe demonstrated before trial, but in the more common cases where a potential for conflict exists which may or may not burgeon into an actual conflict as the trial progresses
    2. *Wheat* does not give much effect to client consents and limits the client's right to choose their lawyer
ii. Compare the burden in *Cuyler* before defendant could vacate his conviction with the burden that *Wheat* required a prosecutor to meet in order to disqualify defense counsel
    1. The burden of disqualifying a lawyer is lower (*Wheat*) than having to establish the impact from a conflicted lawyer (*Cuyler*)
        a. *Wheat* has provided fertile ground for prosecutors asking judges to disqualify defense lawyers
        b. If we want to respect someone choice of counsel, then shouldn't this burden degree be switched?
            i. How much do we weigh the client's desired counsel against the possibility of conflict affecting performance?
iii. Policy re: why does the prosecutor care about possible conflicts for defense lawyers:
    1. They want justice to be done – want D to have good representation and to ensure D's conviction will stand

a. And for this reason, arguments have prevailed that it is a different situation for prosecutors to bring up issues of conflict and disqualification, as opposed to opposing counsel – because prosecutors are concerned about fairness and justice

2. Conflicted counsel is a good lawyer and government wants a weaker lawyer

e. Criminal Case Disqualification and the "Automatic Reversal" Rule

i. Ex: *United States v. Gonzalez-Lopez* (U.S. 2006): <u>an erroneous denial of counsel of choice warrants automatic reversal, even if the defendant can show no other trial error</u>

1. The right at stake here is the right to counsel of choice, not the right to a fair trial – and that right is violated when the deprivation of counsel was erroneous

a. <u>No</u> requirement that defendant show actual adverse impact on the result

III. Criminal Cases (Prosecutors)

a. A prosecutor may have a conflict, concurrent or successive, for the same variety of reasons as any other lawyer

b. **Rule 3.8: Special Responsibilities of a Prosecutor**: The prosecutor in a criminal case shall:

i. (a) refrain from prosecuting a charge that the prosecutor *knows* is not supported by probable cause;

ii. (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

iii. (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

iv. (d) **make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense**, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

v. (e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

1. (1) the information sought is not protected from disclosure by any applicable privilege;
2. (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
3. (3) there is no other feasible alternative to obtain the information;

vi. (f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule

vii. (g) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor <u>shall</u>:

1. (1) promptly disclose that evidence to an appropriate court or authority, and
2. (2) if the conviction was obtained in the prosecutor's jurisdiction,

a. (i) promptly disclose that evidence to the defendant unless a court authorizes delay, and

b. (ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit

viii. (h) When a prosecutor *knows* of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction

c. Ex: *Young v. United States ex rel. Vuitton* (U.S. 1987): a judge can appoint a private lawyer to prosecute a contempt charge … but it was not appropriate to appoint Vuitton's lawyer – an interested party – to prosecute the case; Vuitton's lawyers will have divided loyalty between their employer and the United States (i.e., private interests could interfere with public justice); prosecutors should not have divided loyalty – they are there to serve public justice on behalf of the government
   i. Justice White does not like what the lower court did, but he does not see anything constitutionally wrong with it
   ii. A number of other justices conceded that there could be a problem with what the lower court did, but do not want to do anything with it unless petitioner can show that it made a difference
      1. But it is hard to unpack motivations and influences on a prosecutor, so not sure how high this burden would be
   iii. Note: Tennessee allows a lawyer for a private party to prosecute an opposing client for contempt
      1. Court noted that this was the only way to prosecute these types of cases – D.A.'s office wouldn't do otherwise
      2. Distinguished *Young* because unlike the private attorneys appointed as special prosecutors in *Young*, private attorneys prosecuting criminal contempt actions in Tennessee are not ordinarily clothed with all the powers of a public prosecutor
   iv. Pettit: It is generally right that we are not going to have interested parties doing criminal prosecutors, *but* there are exceptions, so we cannot make blanket statements

d. Remember: A prosecutor's client is the government/public – not the victim

Successive Conflicts of Interest

Rule 1.9: Duties to Former Clients

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the *same or a substantially related matter* in which that person's interests are *materially adverse* to the interests of the former client unless the former client gives informed consent, confirmed in writing

(b) A lawyer shall not *knowingly* represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;

- *unless* the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client

Private Practice

I. Ex: "Do I Still Owe the Record Store?": lawyer's specialty is representing retail startups in NYC; lawyer helped incorporate a record store, negotiate the lease, and rezone the sidewalks
   a. Lawyer cannot later represent the landlord trying to evict this tenant (i.e., the lawyer's former client) because the lawyer negotiated the lease
      i. Duty of loyalty is a concern of Rule 1.9

b. Lawyer also cannot represent the landlord because there might be a conflict against the lawyer's own self interest if there is ambiguity in the lease that could be the basis for a malpractice suit, e.g.
    i. The lawyer might be reluctant to argue for a certain interpretation of the lease to protect herself
c. Lawyer cannot represent a community group trying to repeal the re-zoning
    i. This again is a duty of loyalty problem because the lawyer would be undoing the work she did for her former client
d. Lawyer may or may not be able to represent someone who wants to hire her to open a store with the same specialty across the street from lawyer's former client
    i. Concern about the fact that the lawyer knows a lot about her former client's business, which the prospective client/competitor would like to know
        1. Confidentiality is the chief concern of Rule 1.9
    ii. But, there is a concern that this is what the lawyer does – her niche
        1. Rule 1.7, Comment [6]: Simultaneous representation in unrelated matters of clients whose interests are *only* economically adverse (as opposed to legally adverse), such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients
            a. The argument would go: "OK it does not *ordinarily* constitute a conflict, but in this case is does"

II. Hypo: Case (1): Striker (Lawyer Remmington) sues Dr. Cavallo (Lawyer Wrigley) for medical malpractice, and Dr. Cavallo wins; Case (2): Striker sues Lawyer Remmington for legal malpractice, and Striker wants to hire Lawyer Wrigley
    a. Conflict – substantially related and adverse interests here
        i. Confidentiality Concern = confidential information could be used in the litigation that would hurt Dr. Cavallo
        ii. Duty of Loyalty Concern = Lawyer Wrigley representing Striker will inevitably have to say bad things about Dr. Cavallo to establish that Striker had a good case

III. Ex: *Analytica v. NPD Research* (7th Cir. 1983) (Posner): primary concern with successive conflicts is confidentiality – using confidential information that the lawyer obtained from a former client in representation of a current client
    a. Test: A lawyer may not represent an adversary of his former client if the *subject matter* of the two representations is *substantially related*, which means: if the lawyer *could have* obtained confidential information in the first representation that would have been relevant in the second
        i. It is irrelevant whether he actually obtained such information and used it against his former client, or whether – if the lawyer is in a firm rather than an individual practitioner – different people in the firm handled the two matters and scrupulously avoided discussing them
            a. We are not concerned with whether the lawyer *did in fact* obtain confidential information, but rather whether he *could have*
                i. The former is too hard to figure out
            b. We are also concerned not just about whether the information *has been* revealed, but whether it *will be* revealed in the future
        ii. Therefore, **if the substantial relationship test applies, it is not appropriate for the court to inquire into whether actual confidences were disclosed**
            1. Unless the exception applies → cases where the law firm itself did not switch sides (i.e., where an associate of a law firm changes jobs and later his new firm is retained by an adversary of a client)
                a. Here, lawyer can avoid disqualification (even if the matters are substantially related) by showing that effective measures were taken to prevent confidences from being received

IV. "Playbook" Theory

a. Can a matter be "substantially related" to *an area of law* in which the lawyer previously represented the client?
    i. Rule 1.9, Comment [2], suggests that the lawyer may accept the new matter: "A lawyer who recurrently handled a type of problem for a former client is <u>not</u> precluded from later representing another client in a wholly distinct problem of that type even though the subsequent representation involves a position adverse to the prior client"
b. Courts have recognized that a lawyer may have a conflict, however, based on significant familiarity with the operations and strategies of a former client even when the subsequent adverse matter involves different facts and is otherwise unrelated to matters the lawyer had handled for the former client
    i. "Playbook" knowledge can be enough to create a substantial relationship – and therefore a conflict – depending on its scope

V. The Loyalty Duty to Former Clients (i.e., It's Not Only About Confidences)
a. Though much less prominent, the rule does seek to protect loyalty to a former client as a way to encourage clients to repose trust in their lawyers during the professional relationship
    i. <u>The rule forbids lawyers to switch sides and oppose a client even if no confidential information is at risk</u>
b. The notion that loyalty to a former client survives the termination of the relationship is carried over in Rule 1.9 and its comments
    i. Even if no confidential information is at risk, a subsequent adverse representation on a substantially related matter is forbidden
c. Will the loyalty obligation disqualify a lawyer from representing a client against a former client where the parties were once co-clients of the same lawyer?
    i. *Allegaert* and *Christensen* (pre-Model Rules): no conflict, because the clients knew what they said would not be privileged as against each other
    ii. Rule 1.9, Comment [1]: ". . . Nor could a lawyer who has represented multiple clients in a matter represent one of the clients against the others in the same or a substantially related matter after a dispute arose among the clients in that matter, *unless* all affected clients give informed consent"
        1. A specific rejection of the *Allegaert* Rule

VI. Consequences of Disqualification
a. *Analytica* and Rule 1.10(a) impute a lawyer's former-client conflict to all other lawyers in his office
b. When a lawyer or firm is disqualified, the client will have to hire new counsel, who will want to receive the disqualified firm's files
    i. Majority Rule: Absent an identifiably tainted item, the courts have been disposed to allow turnover to successor counsel

VII. Malpractice Based on Successive Conflicts
a. A law firm that acts adversely to a former client in violation of the substantial relationship test will subject itself to liability for breach of fiduciary duty
    i. At the very least, the conduct will violate the lawyer's continuing duty of loyalty
        1. And, to the extent that the lawyer has revealed or used the former client's confidential information, the conduct will also violate her obligation to protect this information
b. In a civil action, the client will have to prove damages (for malpractice liability)
    i. Monetary damages can be hard to prove from a successive conflict

VIII. Who is a Former Client?
a. Current Clients = Rule 1.7 = a little stricter
b. Former Clients = Rule 1.9 = a little looser
    i. *Any* conflict is waiveable – can be taken care of by informed consent – and this is <u>not</u> always the case with Rule 1.7

IX. Like a Hot Potato

a. Rule: A lawyer cannot drop one client (like a hot potato) in order to keep happy or work with a far more lucrative client, with interests adverse to the former client
    i. Ex: *Jelco* (9th Cir. 1981): law firms cannot escape the stricter current-client conflict rules simply by withdrawing from a representation and converting a current client into a former one
    ii. This honors a client's interest in uninterrupted representation to the conclusion of a matter
        1. While a law firm may withdraw from a current representation, it may do so only for the reasons listed in Rule 1.16
            a. The law firm's own economic interests have generally not been deemed an acceptable reason for dropping a client
    iii. Note: This is not black letter law, but it is a notion that many courts have subscribed to
b. Exception: Thrust Upon Conflicts
    i. The conflicts in these situations are not the fault of the law firm – it did not fail in its policing duty – rather, the conflicts arose because of client mergers or acquisitions or through operation of law
        1. Ex: a merger or acquisition suddenly puts the law firm in a conflict situation where they must drop one or both clients

X. Standing and Waiver
a. Successive conflicts may always be waived
b. Should non-clients ever have standing to seek disqualification in successive conflict situations?
    i. Some courts have said yes because of the court's interest in ethical conduct
    ii. Others have said no because the rule is meant to protect the former client, not a stranger

XI. "Appearance of Impropriety"
a. These words do not appear in the Model Rules and courts are moving away from the term
    i. But the notion is that even if you cannot point to a specific violation, if it looks bad that is enough of a reason to justify disqualification
        1. So appearances may still count, depending on jurisdiction, but it is generally in disrepute
            a. "The possible 'appearance of impropriety' is simply too slender a reed on which to rest a disqualification order"

XII. Conflicts in Class Actions
a. Courts are reluctant to apply traditional conflict rules in class action situations when the interests of the class members diverge
    i. Often it will disrupt the litigation and make the situation worse for all class members
        1. Therefore, in some situations, we might not want to apply every rule literally – *but* rather look at the reasons behind the rule and the price we are paying for applying the rule

Imputed Disqualification and Migratory Lawyers

I. **Rule 1.0(k)**: "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law

II. Ex: "You Don't Know Anything": Lakoff used to work at a firm that defended AM for age discrimination, now she is at a firm that is representing a P suing AM for sex discrimination
a. Can Lakoff work on the case?
    i. Rule 1.9(b) – probably comes down to whether these two matters (age and sex discrimination) are substantially related
        1. Playbook Knowledge – maybe it is "substantially related" to an area of law – discrimination against employees
            a. Did they have a general settlement strategy for all discrimination cases?
b. If not, may her new firm still take the case?

i. Rule 1.10(a)(2): While lawyers are associated in a firm, none of them shall knowingly represent a client when any of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, *unless* . . . the prohibition is based upon **Rule 1.9**(a) or (b) and arises out of the disqualified lawyer's association with a prior firm, and:
    1. Disqualified lawyer is timely screened
    2. Written notice is given to any affected former client
    3. Certifications of compliance with these Rules and with the screening procedures are provided to the former client
ii. If Lakoff was timely and effectively screened, then the firm could represent this client

III. Ex: "Can We Hire Taylor Monk?": Monk told prospective firm that the only work she did at her old firm for the prospective firm's major client was researching a memo about punitive damages and federal preemption issues, and attending group discussions to take notes
- a. Rules 1.9 and 1.10 are intended to allow lawyers to migrate from one firm to another
    i. But because this client is so major, the prospective firm is unlikely to hire Monk – too much risk
        1. Risk that a screen would not be deemed effective and Monk's conflict will be imputed to the entire firm, thus disqualifying them from representing this major client
    ii. Could try to argue that the memos are not necessarily significant or material, but rather very general
    iii. Attending group discussions might be construed as having playbook knowledge
- b. Did Monk divulge confidential information in violation of Rule 1.6 when describing to the prospective firm what work she did at the old firm for the client?
    i. It would be one thing to say that she did legal research, but she gave specifics about what she was researching
        1. Pettit thinks there is some argument here that by saying what she did, she could be accused of divulging confidential information

IV. Ex: *Cromley v. Board of Education* (7th Cir. 1994): court permits firms to screen lateral lawyers, but <u>the Seventh Circuit is still in the minority in its willingness to permit a screen</u>; opinion introduces a three-step analysis for determining whether a lawyer should be disqualified:
- a. First – determine whether a substantial relationship exists between the subject matter of the prior and present representations
    i. Yes? Move to Step Two
    ii. No? No disqualification
- b. Second – ascertain whether the presumption of shared confidences with respect to the prior representation has been rebutted (i.e., did the lawyer in question receive shared confidences at the former law firm/representation?)
    i. Yes? Move to Step Three
    ii. No? No disqualification
    iii. Note: The presumption in this Step is rebuttable
- c. Third – if we conclude that the presumption in Step Two has not been rebutted – determine whether the presumption of shared confidences has been rebutter with respect to the present representation (i.e., did the lawyer share confidential information with lawyers in the new firm?)
    i. Yes? Failure to rebut this presumption makes disqualification proper
    ii. No? No disqualification
        1. This presumption should be rebutted by demonstrating that specific institutional mechanisms had been implemented to effectively insulate against any flow of confidential information from the infected attorney to any other member of his new firm
            a. Screening Examples:
                i. Instructions, given to all members of the new firm, of the attorney's recusal and of the ban on exchange of information

ii. Prohibited access to the files and other information on the case
iii. Locked case files with keys distributed to a select few
iv. Secret codes necessary to access pertinent information on electronic hardware
v. Prohibited sharing in the fees derived from such litigation
vi. Affidavits from relevant parties regarding the efforts taken to prevent taint

b. The screening devices must be employer as soon as the disqualifying event occurred
c. Factors re: determining whether adequate protections of the former client's confidences has been achieved:
i. Size of the law firm
ii. Firm's structural divisions
iii. Screened attorney's position in the firm
iv. Likelihood of contact between the screen attorney and one representing another party

iii. Note: The presumption in this Step is rebuttable in the Seventh Circuit
1. But, in a slight majority of states this presumption is <u>not</u> rebuttable
a. Not Rebuttable = No Screening Permitted
2. In the Seventh Circuit, this presumption is irrebuttable *only* when an entire law firm changes sides

d. Two Questions Not Addressed in the Opinion:
i. Why did the court not address whether it was proper for the attorney to negotiate his partnership with the Scariano firm while he was representing Cromley against the Scariano firm's clients?
1. They had a standstill agreement – absolutely nothing of a substantive nature would occur until decisions were made and clients were made aware
a. But maybe we are concerned that the attorney will not fight hard because he does not want to upset his new potential firm
2. Is a standstill in Cromley's best interests?
a. Typically Ps seeking damages do not want delays
3. APA Opinion concludes that once a lawyer's negotiations with an opposing firm reach a critical stage, which can happen in a single conversation, the lawyer must obtain client consent
a. The opposing firm may need the consent of its client as well

ii. Why did the court not ask whether it was proper for the attorney to drop a client in the middle of a representation in order to further his own career?
1. The court assumes the attorney had an absolute right to walk away from his client
2. Typical "hot potato" scenario is when a lawyer drops a small client to represent a much more lucrative client that they do not want to pass up
a. Courts are <u>not</u> sympathetic to the lawyer in these situations
3. This case might be different because there is an effort to allow lawyers to move and make career choices
a. Therefore, despite the fact that the client is getting screwed in both situations, courts might be more deferential and flexible when it comes down to career choices as the reason

V. Presumptions in Imputed Disqualification
a. ***Cromley* and Rule 1.10(a)** → presumption that migratory lawyer shared confidences with the new firm is *rebuttable*
i. Most lawyers who are affiliated with even moderate-sized law firms and corporate law offices will never learn all the confidential information possessed by their offices

1. If a presumption that they do is conclusive, lawyer mobility between firms will be severely constrained, an effect especially damaging to lawyers at the start of their careers

ii. *See* Rule 1.9(b) and comments [4] and [5]

b. **Slight Majority of States** → presumption that migratory lawyer shared confidences with the new firm is *irrebuttable*

i. Screens will not assure clients that their confidences will be protected because the temptation to share is too great

ii. Counter: Disclosing confidential information violates the ethical rules, so by making the presumption irrebuttable, we are essentially saying that lawyers will not follow the ethical rules regarding nondisclosure

VI. Removing Conflicts from a Former Firm

a. The Model Rules and case law also speak to the situation where a lawyer terminates an association with a firm and the firm then wishes to represent a new client whose interests are materially adverse to those of a former client represented by the formerly associated lawyer while at the firm

i. Rule 1.10(b) permits the firm to represent the new client, even if the matter is the same or substantially related to the one in which the formerly associated lawyer represented the former client, so long as the firm can show that no lawyer remaining in the firm has protected information that could be used to the disadvantage of the former client

1. Therefore, **when a disqualified lawyer leaves, the entire firm may be "cured" of the imputed disqualification**

b. Ex: *Hartford* (S.D.N.Y. 1989): basically, the firm fired the lawyer to get around the hot potato problem, hoping that by dropping the lawyer the less lucrative client would go with the dropped lawyer – therefore curing the conflict; court: upheld this maneuver because there was no prejudice to the client – the client had not been denied its longtime counsel

VII. Consent to Screening

a. **Even in jurisdictions that do not allow screening, a client may always consent to one and clients often do** – especially to facilitate job mobility of younger lawyers, at least where the client is not threatened by what the lateral lawyer knows

i. Perhaps this is because their law firms encourage consent, knowing that some day they may need the same favor

VIII. Nonlawyer Conflicts

a. Paralegals, summer associates, and secretaries can carry information too – although some court are then more likely to tolerate screens

i. Some jurisdictions will apply the successive conflict rules to summer associates

ii. Rule 1.10, Comment [4] allows screening of support personnel and former summer associates

Government Service

I. Rule 1.11: Special Conflicts of Interest for Former and Current Government Officers and Employees

a. (a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

i. (1) is subject to Rule 1.9(c); and

ii. (2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, *unless* the appropriate government agency gives its **informed consent**, confirmed in writing, to the representation

1. [So there is no imputation of the whole government, as we would see in a law firm – imputation is limited to matters in which you participated personally and substantially]

b. (b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may *knowingly* undertake or continue representation in such a matter *unless*:

i. (1) the disqualified lawyer is timely **screened** from any participation in the matter and is apportioned no part of the fee therefrom; and
ii. (2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule

c. (c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential *government* information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom

d. (d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:
   i. (1) is subject to Rules 1.7 and 1.9; and
   ii. (2) shall not:
      1. (i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or
      2. (ii) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b)

e. (e) As used in this Rule, the term "matter" includes:
   i. (1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and
   ii. (2) any other matter covered by the conflict of interest rules of the appropriate government agency

II. Revolving Door → leads in and out of government service
   a. There is a public interest concern in having great lawyers be able to come work for the government
   b. There is a concern about having government lawyers secure great post-government jobs

III. If the government were no different from any other former client, Rules 1.9 and 1.10 would define the limits on post-government work
   a. However, Rule 1.10(d) specifically excludes the use of private lawyer imputation rules for government lawyers, referring instead to the different resolution in Rule 1.11

IV. Ex: "Investigating Landlords": City Attorney hires Chen from private practice as a Special Assistant City Attorney to conduct an investigation and recommend legislation about landlord abuses in the city; the legislation passes; and Chen returns to private practice
   a. Can Chen, or others at her firm, represent a tenant suing a landlord under the statute?
      i. If the landlord sued was specifically investigated by Chen, she <u>cannot</u> represent the tenant because she acquired confidential government information → Rule 1.11(c)
         1. The City cannot consent to cure this successive conflict – it is not a waivable issue because we do not want the former government lawyer to use information gathered as a government employee against people like this landlord

2. *But*, someone at Chen's firm can represent this tenant if Chen is timely and effectively screened under Rule 1.11(b) and 1.11(c)

ii. If the landlord was not specifically investigated by Chen and she does not have confidential government information, Chen can represent the tenant if the government agency gives its informed consent → Rule 1.11(a)(2)

b. Can Chen, or others at her firm, represent a landlord sued under the statute?

i. Rule 1.11(c) does not apply, despite that the lawyer has confidential government information about the landlord, because the landlord is her client (i.e., the information will <u>not</u> be used *against* the landlord)

V. Ex: *Armstrong v. McAlpin* (2d Cir. 1980) (en banc): former SEC lawyer was now at a firm representing someone who was the subject of SEC investigation; concern is whether the new firm will benefit from information the former SEC lawyer obtained while working for the government (he knew matters about the investigation but did not directly oversee the SEC investigation or anything); court eventually upheld the screen of a former SEC lawyer; rejects the appearance of impropriety standard

a. FN 24: This case is entirely distinguishable from *General Motors* (2d Cir. 1974), where an attorney who had substantial responsibility over antitrust litigation against GM while he was employed by the Antitrust Division of the DOJ later accepted employment as plaintiff's attorney in a private antitrust action against the same defendant for substantially the same conduct

i. Is this case really distinguishable though?

ii. The Model Rules *partly* rejected *General Motors*

1. Rule 1.11(a) <u>would allow</u> a lawyer to represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee so long as the appropriate government agency gives its informed consent

a. Furthermore, Rule 1.11(a) is not limited to the situation where the lawyer remains on the same side

i. With consent, Rule 1.11(a) would permit the lawyer to represent the other side on the very matter on which he had worked while in public office

2. There is one instance in which the Model Rules would <u>not</u> allow the government to consent to private representation after leaving government – and that instance is present in *General Motors*

a. This is where the lawyer has "confidential *government* information" about a person that could be used in the representation of a private client whose interests are adverse to that person

i. "Confidential *government* information" should be distinguished from "confidential information"

ii. Rule 1.11 contemplates that while in government service a lawyer may gain information about individuals to which only the government has access or which is particularly within the power of the government to compel (tax returns, trade secrets, grand jury testimony, e.g.)

1. The Rules prevent a private client from hiring a former government lawyer in order to exploit such information about an opponent

3. If the former government lawyer cannot get the consent contemplated by Rule 1.11 or is disqualified because she possesses confidential government information under Rule 1.11(c), the Rules still permit her firm to accept the representation so long as the lawyer is screened and receives no portion of the fee

a. No permission need be obtained from the government to use a screening device

VI. The Model Rules also speak to a lawyer's responsibility when moving from private practice to government employment
    a. Rule 1.11(d) → a government lawyer is disqualified under this rule as well as under Rule 1.9(a) from participating in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment

Special Lawyer Roles

Ethics in Advocacy

Introduction

I. Adversary System
    a. Advocate believes his role is to do everything possible to get a win for the client
        i. This role is limited by law and ethical rules, but it should not be limited by personal ethics
            1. To employ one's personal ethics to limit advocacy for the client is wrong
    b. Advocates think this is the best system for society
II. Keep in mind → Pettit thinks something can be wrong, even if it invokes a defensible legal position, if it is used for an improper purpose

Three Views of Adversary Justice

I. Anthony Trollope, *Orley Farm*
II. Simon Rifkind, *The Lawyer's Role and Responsibility in Modern Society*
    a. It is not true that the only goal of a trial is to reach truth
        i. There are privileges, constitutional limits, exclusionary rules, etc.
            1. We are looking for a kind of truth, but not an objective/factual truth
    b. The quality of our justice would suffer grievously if trials were just about finding objective truth
    c. Lawyers must be aware of their place in the adversary system
        i. Incentives generated by the adversary system tend to bring about a more thorough search and evaluation of the law
    d. Our system is good for liberty and peaceful progress
        i. Occasional poor results are price we have to pay for the long range benefit of the system
            1. Conceding that the adversary system is not perfect, but it is better than anything else someone has come up with
III. Marvin Frankel, *Partisan Justice*
    a. Our system perpetuates adversarialness – enthroning combat as the paramount good – and this is good for adversaries, but not for dispute resolution
    b. Lawyers spend too much of their time subverting the search for truth
        i. Who wins? The more skillful lawyer, not necessarily the lawyer who has truth on his side
IV. Different Between Rifkind and Frankel:
    a. They are both describing the same system, but they differ about whether it is a good or bad one
        i. For Rifkind, insistence on trying to discover some absolute truth is misguided
        ii. For Frankel, just seeking objective truth should have a more prominent role
            1. Frankel does not necessarily accept the idea that our confrontation method is the best way to reach the truth
V. Which System Is Better?
    a. Under the adversarial system, it is a lawyer's responsibility to win regardless of the merits of his client's case, so long as the lawyer does nothing illegal or unethical
        i. A client's chance of winning is improved if the client has more information than the adversary
            1. If the factual or legal investigations produce information that is damaging to the client's matter, the client will generally have no obligation to reveal this information to the adversary or the judge

2. All things being equal, sometimes the more money a client had, the greater the likelihood that he will win or force a generous settlement

b. In the cooperative system, lawyers for both sides are responsible for pooling all information about a dispute in an effort to determine what really happened
   i. All reports from investigators and experts must be shared
   ii. Lawyers are also responsible for sharing their legal research, favorable or unfavorable
   iii. If in preparing his case a lawyer happens to come upon facts or cases useful to his opponent, he must reveal them
      1. In effect, the facts in each lawyer's file belongs to his or her opponent
         a. So only thing kept secret would be the lawyer's thought processes
   iv. Supporters of the cooperative system argue that (a) it will provide greater accuracy in fact finding, (b) it will reduce unfairness due to disparities in wealth, and (c) it will lead to swifter and cheaper resolution of civil disputes

Are Lawyers Ever Morally Accountable for Their Clients?

I. **Rule 1.2(b)**: "A lawyer's representation of a client, including representation by appointment, does <u>not</u> constitute an endorsement of the client's political, economic, social, or moral views or activities
   a. Many lawyers would say that making any moral judgments about other lawyers because of the identity or goals of their clients or the nature of their work will impede the availability of counsel, including counsel for political dissidents, minorities, and others most in need of the law's protection

II. **Rule 2.1: Advisor**: In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation

III. Ex: Credit Suisse & Nazi connection: no right answer
   a. One view: "The essential difference is that Credit Suisse is an upstanding financial institution whose general policy is to comply with all rules and laws applicable. If it makes a mistake, it is entitled to a defense. But if someone is deliberately assassinating people (i.e., Moammar Gadhafi) they do not earn the same entitlement to legal representation
   b. Another view: "Lawyers do have choices, and we should not set aside our moral scruples when we go to work. Private lawyers have refused and dismissed clients over ethical differences. We should sit in judgment of those who walk into our offices – or be prepared to be judged by the company we keep"

Truth and Confidences

I. Rule 3.3: Candor Toward the Tribunal
   a. (a) A lawyer shall not *knowingly*:
      i. (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
      ii. (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
      iii. (3) offer evidence that the lawyer ***knows*** to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take *reasonable remedial measures, including, if necessary, disclosure to the tribunal*. A lawyer <u>may</u> refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false
         1. Comment [10]: . . . A lawyer should first "remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdraw from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation,

even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6 . . .

a. Steps:
    i. First – talk to the client
    ii. Second – try to withdraw (noisy or otherwise) (need court permission)
    iii. Third – reveal

b. (b) A lawyer who represents a client in an adjudicative proceeding and who ***knows*** that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal
c. (c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6
d. (d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse
e. Note: Rule 1.0(f): "Knowingly," "known," or "knows" denotes *actual knowledge* of the fact in question.
    i. A person's knowledge may be inferred from circumstances
f. Note: Rule 3.3, Comment [8]: The prohibition against offering false evidence only applies if the lawyer ***knows*** that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood
    i. High standard – but not impossible to meet

II. Debate → Whether a lawyer's duties of confidentiality and loyalty to a client should be superior to any duty the lawyer would otherwise have to prevent or correct a fraud on the court, or whether instead the lawyer as an "officer of the court" should have a duty to prevent or correct such a fraud notwithstanding that doing so will reveal a client's confidences and perhaps subject a criminal defendant to further prosecution and longer incarceration and a civil litigant to a devastating loss and a perjury charge
    a. 1908 Canons of Professional Ethics
        i. Treated confidentiality and loyalty as more important than a duty to correct perjury
    b. 1970 Code of Professional Responsibility
        i. Treated confidentiality and loyalty as more important than a duty to correct perjury
            1. If a lawyer has received information clearly establishing that a client has, in the course of the representation, perpetrated (i.e., already done) a fraud upon a tribunal and the client refuses to correct it, the lawyer shall reveal the fraud to the affected tribunal, *except* when the information is protected as a privileged communication
                a. ABA Opinion: "privileged communication" = confidences and secrets (i.e. information not from the client)
            2. The exceptions swallow the rule
    c. Model Rules
        i. Reflecting the majority view, reversed the priority – **duty to correct perjury as more important than confidentiality and loyalty** – at least in part, including in criminal cases
        ii. 1983:
            1. Very broad duties to disclose false evidence
                a. But there was an exception for lawyers with defendants in criminal cases
        iii. Current:
            1. **Rule 3.3** narrows the duties of disclosure, but makes no exception for lawyers in criminal cases

2. **Rule 3.1: Meritorious Claims and Contentions**: A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, *unless* there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established
    a. Even if you know your client is guilty, you have the right and duty to vigorously conduct a defense
        i. This includes entering a not guilty plea, cross examining witnesses, and making arguments
        ii. This does not include offering knowingly false testimony

d. Concerns:
    i. Criminal defendant has a constitutional right to testify in his own defense
    ii. Sixth Amendment guarantees the right to effective assistance of counsel – and that might be implicated in these situations
    iii. The role of the criminal defense lawyer is to require the state to prove its case beyond a reasonable doubt
        1. The defense lawyer is defending an individual against the power of the state, so the defense lawyer should not help the state with their prosecution in that way

e. Model Rules vs. Massachusetts re: Lawyer Knows His Client has Lied
    i. Model Rules: lawyer must disclose
    ii. Massachusetts: ". . . If, during the client's testimony or after the client has testified, the lawyer knows that the client has testified falsely, the lawyer shall call upon the client to rectify the false statement and, if the client refuses or is unable to do so, the lawyer shall not reveal the false testimony to the tribunal . . ."
        1. **Narrative Approach**: "In no event may the lawyer examine the client in such a manner as to elicit any testimony from the client the lawyer knows to be false, and the lawyer shall not argue the probative value of the false testimony in closing argument or in any other proceedings"
            a. Basically, the attorney tells the jury that defendant will offer their testimony about what happened, and then the attorney sits down – does not use what the defendant said to make arguments of innocence and does not ask defendant any questions about the testimony

III. Ex: *Nix v. Whiteside* (U.S. 1986): issue = whether the Sixth Amendment right of a criminal defendant to assistance of counsel is violated when an attorney refuses to cooperate with the defendant in presenting perjured testimony at his trial
    a. Rule: To obtain relief by way of federal habeas corpus on a claim of deprivation of effective assistance of counsel under the Sixth Amendment, the movant must establish: (1) serious attorney error ***and*** (2) prejudice (*Strickland*)
        i. **To show error**: it must be established that the assistance rendered by counsel was constitutionally deficient in that counsel made errors so serious that counsel was not functioning as "counsel" guaranteed the defendant by the Sixth Amendment
        ii. **To show prejudice**: it must be established that the claimed lapses in counsel's performance rendered the trial unfair so as to undermine confidence in the outcome of the trial
            1. Defendant must show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different
    b. SCOTUS re: ABA Ethical Standards → "prevailing norms of practice as reflected in ABA standards are the like are guides to determining what is reasonable, but they are only guides"

c. Under the *Strickland* standard, breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of effective assistance of counsel
d. Robinson's admonitions to his client can in no sense be said to have forced respondent into an impermissible choice between his right to counsel and his right to testify as he proposed for there was no permissible choice to testify falsely
    i. <u>For defense counsel to take steps to persuade a criminal defendant to testify truthfully, or to withdraw, deprives the defendant of neither his right to counsel nor the right to testify truthfully</u>
        1. When an accused proposes to resort to perjury or to produce false evidence, one consequence is the risk of withdrawal of counsel
e. Concurrences warn that this was an easy case, and there may be tougher questions lurking . . .

IV. What is the Best Ethical Solution?
a. **Full Cooperation with Presenting Defendant's Testimony** (even when defendant intends to commit perjury) → Monroe Friedman takes this position because it is the least of all evils for the defense lawyer to just do his job – call witnesses and ask questions – not to act as judge or jury; you would be sabotaging your client by not eliciting his testimony, which would give indications of a problem
    i. This view has not received much acceptance
        1. In fact, it could result in disciplinary action
b. **Persuading the Client Not to Commit Perjury** → this is the ideal solution, if it is successful
    i. You have to first try this solution under the Model Rules
c. **Withdraw from Representation** → this may protect the attorney's interest in not presenting perjured testimony, but it does not solve the problem
    i. Court could deny the motion to withdraw
    ii. Could hurt the trial if the motion comes too late
d. **Disclosure to the Court** → this is what the Model Rules say needs to happen if the attorney is unsuccessful in convincing the client to not commit perjury and/or withdrawing
    i. Some think that mandatory disclosure is problematic because it compromises the attorney's ethical duty to keep client communications confidential
        1. And, until the defendant actually takes the stand and testifies falsely, there is always a chance the defendant will change his mind and testify truthfully
e. **Refusing to Permit the Defendant to Testify** → this is unconstitutional because it violates the defendant's right to testify
    i. It also essentially substitutes defense counsel for the jury as the judge of witness credibility
f. **The Narrative Approach** → some courts hold this as the best accommodation of the competing interests
    i. CA court: This is the best accommodation because it allows the defendant to tell the jury, in his own words, his version of what occurred . . . and allows the attorney to play a passive role
        1. The danger that the defendant may testify falsely is mitigated by the fact that the defendant is subject to impeachment and can be cross-examined just like any other witness
    ii. Gillers: Does <u>not</u> agree with the narrative approach because it is making a compromise where one should not be made
        1. *Nix* tells us that a defendant who is going to lie has no right to testify at all (at least not about the lies), so why give him a half loaf (a narrative) when he's entitled to no loaf at all?
    iii. Massachusetts and Wisconsin both opt for narrative where a criminal defendant will testify falsely
        1. Wisconsin – absent the most extraordinary circumstances, the defense lawyer's knowledge must be based on the client's expressed admission of intent to testify untruthfully

        a. It must be unambiguous and directly made to the attorney
    2. Massachusetts – attorney only needs a "firm, factual basis" to believe the client will lie before he can invoke the narrative approach

V. Consequence of These Rules:
    a. Lawyers may avoid knowledge – willful blindness notion
        i. Is there anything unethical about the lawyer avoiding knowledge?
            1. Lawyers should be competent, and usually competence requires good factual investigation
                a. But there could be things you know the answer would hurt your client, so you just do not inquire into those
            2. So, assuming you are not violating the duty of competence, is there anything unethical about avoiding information because it may limit what you can do at trial?
                a. Could you say: "Before you tell me your story, you should know ethical rules may prevent me from letting you testify contrary to what you tell me now, and I may be unable to present witnesses or ask questions that contradict your story"?

VI. Ethics, Lies, and Federal Rule of Civil Procedure Rule 26
    a. In civil matters, a lawyer is perhaps most likely to encounter perjury or fraud on a court during pretrial discovery
        i. ABA Opinion, applying Rule 3.3, concluded that revelation may prove to be the only reasonable remedial measure in the client fraud situation most likely to be encountered in pretrial proceedings, including discovery
            1. This is because even a conspicuous withdrawal at that time may not be adequate to correct the fraud, as the rule requires
    b. There is a relationship between disclosure obligations in Rule 3.3 and disclosure obligations that may exist in discovery rules
        i. When discovery rules mandate revelation and the client refuses to honor this, Rule 3.3 may require the lawyer to correct that failure
            1. However, three Justices take the position that FRCP Rule 26 is out of sync with our judicial system, so they may take that same view towards Model Rule 3.3
                a. "The proposed new regime does not fit comfortably within the American judicial system, which relies on adversarial litigation to develop the facts before a neutral decision maker. By placing upon lawyers the obligation to disclose information damaging to their clients . . . the new Rule [26] would place intolerable strain upon the lawyers' ethical duty to represent their clients and not to assist the opposing side . . ."

VII. Gillers' Summary: Variables in Analyzing Issues Concerning Witness Perjury (i.e., what courts consider)
    a. Timing
        i. Prospective perjury
        ii. Surprise perjury
        iii. Concluded perjury
    b. Nature of the case
        i. Criminal
            1. The defendant as witness
            2. Other witness
        ii. Civil
    c. Lawyers' state of mind
        i. Knowledge
        ii. Reasonable belief
    d. Remedies
        i. Remonstrate with client

ii. Withdraw, if allowed
iii. Reveal to tribunal
iv. Let criminal defendant testify in narrative and refrain from arguing in summation
v. Refuse to call client (prospective perjury)
vi. Let criminal defendant testify, question client, argue testimony

e. Legal considerations
i. Text of jurisdiction's rule
ii. Constitutional right of criminal defendants to testify and to assistance of counsel
iii. Client autonomy
iv. Duty of confidentiality
v. Duty of competence
vi. Criminal law prohibitions against persuading someone to commit perjury

Lawyer as Advocate (Supplement)

I. Hypo (1)
a. A lawyer <u>may</u> assist the defendant-client in entering a not guilty plea, even though they know the client committed the crime
i. Not guilty pleas are a legal procedure defendants are allowed to assert
1. They are not under oath and they are not considered statements of fact
ii. Rule 3.1: A lawyer must put the prosecution to its proof
1. Note: This is a special *criminal* rule
a. <u>Cannot</u> try to use an argument like this to put the plaintiff to its proof in a civil case
b. A lawyer may vigorously cross-examine a rape victim that the lawyer knows was raped by the defendant-client to call into question her credibility, so long as the questions fall within the FRE
i. The lawyer may look like a bully, so there might be strategic reasons for not wanting to do this
c. Part of a lawyer's job as an advocate is to do things like fight hard to keep defendant-client's prior rape convictions out of evidence, so the jury does not learn of them
i. Lawyer's job is <u>not</u> to reach the truth, but to vigorously represent the client
d. Lawyer cannot knowingly offer false testimony though

II. Hypo (2)
a. Rule 3.3(a)(1) – a lawyer cannot knowingly make a false statement of fact or law to a tribunal (and filing an answer is probably deemed "to a tribunal")
i. So attorney cannot deny that the client was drunk, but he can deny that the client botched the operation

III. Hypo (3)
a. FRCP 11(b)(3): the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery
b. Rule 3.1, Comment [2]: The filing of an action or defense of similar action taken for a client is <u>not</u> frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is <u>not</u> frivolous even though the lawyer believes that the client's position ultimately will not prevail
c. Lawyer can most likely file this complaint, even though the minimal investigation you did did not substantiate your client's story (yet)
i. It is OK for a lawyer to believe their client over others

<u>Special Issues in Litigation</u>

Real and Electronic Evidence

I. Real evidence is essentially a document or object that may have relevance to a pending or impending case

II. Ex: "Reliable Sources Say": WSJ reports that DOJ is investigating price fixing of a certain drug, of which only four companies manufacturer; GC for one of the companies has no reason to think that it is her company, but she is wondering what she should do
    a. Might argue that since there are only four companies, all four companies should be on notice that their company may be under investigation
    b. GC might be worried that if employees read this WSJ article they may get scared and do something stupid that will expose the company to liability in the future
    c. GC would want to at least talk to the CEO and the Board on an emergency basis
    d. GC might want to send an email to all employees: "As a result of the WSJ article, destroying any documents will subject you and this company to criminal liability. We do have a document destruction policy, but we are suspending it until we know more"
        i. Downside: GC does not *know* that it is their company, and document destruction policies are usually in place for good reason
        ii. Benefit: Document destruction might also be destroying exculpatory evidence
    e. Criminal law concern = obstruction of justice statutes
        i. Some do not even require that an official proceeding be pending or even impending to apply – so long as D expected a grand jury investigation or trial in the foreseeable future

III. Ex: "Vanity Ink": lawyer cannot destroy, tamper with, or hide the evidence (i.e., the pen her client forgot); if holding onto the pen is akin to concealing it, then the lawyer might be violating obstruction of justice statutes; physical items are not protected by the attorney-client privilege
    a. Rule 3.4(a): A lawyer shall not unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act
        i. "Unlawfully" as determined by the substantive law (need to consult)
    b. If pros knows who our client is, the lawyer returning the pen to the pros will make it easy for them to put two and two together
        i. And, even if the pros does not know who our client is, she could likely demand to know the name of our client – and might be successful if the name of the client is not deemed to be a confidential communication
    c. Apparently there is not a problem with the lawyer returning the pen to her client
        i. Lawyer can advise the client of the consequences of keeping or destroying the pen → just give him what the law is
            1. Client has a right to know that the pen is very strong evidence against them

IV. Real Evidence and Legal Ethics
    a. Ex: *In re Ryder* (E.D. Va. 1967): after receiving and ignoring legal advice, attorney took money and a sawed off shotgun from his client's safe deposit box to his own; despite the fact that he claims he was ultimately going to return the money it is illegal in and of itself to possess money from and weapons used to commit a bank robbery; attorney unsuccessfully tried to claim attorney-client privilege over the objects
        i. Attorney found criminally liable for obstruction of justice – and – to have violated **Rule 3.4(a)**: A lawyer shall not unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act
        ii. What should Ryder have done?
            1. Most attorneys would advise the client – this is what happens if you destroy it, this is what happens if you don't destroy it – and then the lawyer washes their hands of it
                a. In the absence of more specific directions from the law, all we can do it inform the clients of the consequences of certain courses of action and let them make their own decision

V. Real Evidence and Criminal Law

a. The criminal law on this issue can be pretty demanding (compared to Rule 3.4(a), which Gillers pretty much thinks defers to criminal law)
    i. Primary Criminal Law Source: Obstruction of Justice Statutes
        1. Ex: 18 U.S.C. §1512
            a. (b) Whoever … corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to –
                i. (2) cause or induce any person to –
                    1. (B) alter, destroy, manipulate, or conceal an item with intent to impair the object's integrity or availability for use in an official proceeding … shall be fined until this title or imprisoned not more than 10 years, or both
            b. (c) Whoever corruptly –
                i. (1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; or
                ii. (2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so, shall be fined under this title or imprisoned not more than 20 years, or both
                    1. An "official proceeding" need not be pending or even impending for this section to apply, so long as the defendant expected a grand jury investigation and/or trial in the foreseeable future
        2. Note: Being a lawyer for a client is <u>not</u> a defense to the obstruction of justice statutes – a lawyer cannot defend by saying they were just advocating for the client (by hiding the evidence, e.g.)
b. Ex: *United States v. Philip Russell*: attorney destroyed the evidence – church laptop with child porn on it – and we know this is obviously an obstruction of justice
    i. What could the attorney have done instead?
        1. Try to get the church to report this choir master to the authorities, turn the laptop over and explain all they know
            a. If they refuse, you should advise them that holding onto the laptop will subject them to criminal prosecution
        2. Pettit thinks there are ethical problems if you do turn them in yourself because of confidentiality concerns
        3. Best advice is probably to give them the consequences of the various courses of action, advise them to turn it over, and then withdraw

c. May a lawyer advise a client to lie if the lie isn't a crime or fraud?

i. If the lie is <u>not</u> criminal or fraudulent and if the advice <u>does not</u> aid a crime or fraud then, so far as Gillers can tell, the advice is allowed

VI. Real Evidence and the Attorney-Client Privilege

a. Note: Physical items are <u>not</u> protected by the attorney-client privilege
    i. Therefore a client cannot make discoverable things out of reach by giving it to the lawyer
    ii. **Exception**: (*Fisher*) attorneys do not have to turn over documents if they would have been privileged if in the client's possession
        1. A lawyer cannot assert a Fifth Amendment claim on behalf of the client, but can assert attorney-client privilege
b. Ex: *People v. Meredith* (Cal. 1981): wallet is definitely admissible – everyone concedes this

i. Issue #1: Whether under the circumstances of this case Frick's observation of the *location* of the wallet – the product of a privileged communication – finds protection under the attorney-client privilege
    1. Competing policy considerations here:
        a. To deny protection to observations arising from confidential communications might chill free and open communication between attorney and client and might also inhibit counsel's investigation of his client's case
        b. But, we cannot extend the attorney-client privilege so far that it renders evidence immune from discovery and admission merely because the defense seizes it first
    2. <u>The law does protect as privileged the defendant's *statements* to his lawyer regarding the location of the wallet</u>
        a. And the information retained its protection even though the lawyer disclosed the substance of the communication to the investigator, since the purpose of this disclosure was to aid in the representation
        b. (And if they testified in a hearing about this information that would also not be deemed a waiver of the privilege because such testimony was compelled)
    3. <u>Holding</u>: The attorney-client privilege is *not* strictly limited to communications, but extends to protect observations made as a consequence of protected communications
ii. Issue #2: Whether that privilege encompasses a case in which the defense, by removing or altering evidence, interferes with the prosecution's opportunity to discover that evidence
    1. When defense counsel alters or removed physical evidence, he necessarily deprives the prosecution of the opportunity to observe that evidence in its original condition or location – and either one could be a substantive issue in the litigation
        a. To extend the attorney-client privilege to a case in which the defense removed evidence might encourage defense counsel to race the police to seize critical evidence
    2. <u>Holding</u>: Courts must craft an exception to the protection extended by the attorney-client privilege in cases in which counsel has removed or altered evidence
        a. Whenever defense counsel removes or alters evidence, the statutory privilege does <u>not</u> bar revelation of the original location or condition of the evidence in question
            i. We thus view the defense's decision to remove evidence as a tactical choice
                1. If defense counsel leaves the evidence where he discovers it, his observations derived from privileged communications are insulated from revelation
                2. If, however, counsel chooses to remove evidence to examine or test it, the original location and condition of that evidence lose the protection of the privilege
iii. Is this the right result?
    1. Pettit wonders whether this case creates the right incentives
        a. If the case came out the other way, we'd have lawyers doing what the lawyer did here – looking at it and turning it over – isn't this preferable to having the client destroy it?

b. By allowing the lawyer to remove it and hand it over without disclosing, then at least the prosecution gets the wallet (i.e., police might have never found the wallet but for the attorney turning it in)
    i. But prosecution might think the wallet is no good if the location is not disclosed …

VII. The Turnover Duty (But How Broad)?
- a. Obvious Things:
    - i. At least where the evidence is a fruit or instrumentality of a crime – illegal in itself to possess – a lawyer cannot keep the evidence
    - ii. A lawyer cannot destroy evidence, obviously
- b. Non-Obvious Thing → When Is There a Duty to Turnover?
    - i. A lawyer can escape the turnover obligation simply by not taking possession of the item
        1. The lawyer has no obligation to reveal its location
        2. But defense counsel may want to take possession for tactical reasons – examine for evidence, e.g.
    - ii. If a non-privileged document (a telephone bill, e.g.) is subpoenaed, the law firm must produce the document
    - iii. Ex: *Morrell v. State*: lawyer got the relevant document from the client's friend who was driving his car (while client was in prison); court suggests that the attorney would have been obligated to see that the evidence reached the prosecution in this case even if he had obtained the evidence from the client, not from a third party – Gillers & Pettit not sure this is consistent with what we know up to this point
        1. Ultimately the court held that the attorney's conduct did not make his representation ineffective where the source was not his client, but a third person
    - iv. An attorney may assert the attorney-client privilege in resisting a summons to produce documents that were delivered to him by his client, *if* the documents would have been privileged while in the client's possession
- c. Video: Lawyer's legal aid client is charged with arson; client's friend gives the lawyer a floppy disk with incriminating evidence on it, saying that the client wanted him to give it to the lawyer; pros finds out about the disk and brings a complaint against the lawyer for concealing evidence under Rule 3.4(a) and interfering with the administration of justice under Rule 8.4(d)
    - i. If the client did indeed tell the friend to give the lawyer the disk, then Pettit sees no problem with the attorney looking at the disk
        1. But, how sure are we that it was from the client?
            a. Likely want to check with the client
    - ii. Pettit does not think that the lawyer must look at the disk
    - iii. If the disk is subpoenaed, then the attorney must turn it over
    - iv. If the disk is not subpoenaed, then the attorney does not have to turn it over
        1. Following *Morrell*, this is not an instrumentality or fruit of the crime, it is just mere evidence
    - v. Rule 3.4(a) mandates that the lawyer not "unlawfully" obstruct another party's access to evidence, etc.
        1. We would have to check the obstruction of justice statutes to see whether the lawyer did anything "unlawfully"
    - vi. Rule 8.4(d) is phrased very broadly
        1. If we read it too broadly, then the attorney-client privilege would be considered prejudicial to the administration of justice

VIII. A Lawyer's E-Discovery Obligations
- a. **Rule 4.4(b)**: A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender

i. Comment [2]: If a lawyer knows or reasonably should know that such a document was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived
ii. Comment [3]: Some lawyers may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer

b. Ex: *Zubulake v. UBS* (S.D.N.Y. 2004): judge lays down a set of mandatory obligations for lawyers to follow, and they have since been quite influential for e-discovery rules
    i. Once a party *reasonably anticipates* litigation, it must suspend its routine document retention/destruction policy and put in place a "litigation hold" to ensure the preservation of relevant documents
    ii. Once a litigation hold is in place, a party and her counsel must make certain that all sources of potentially relevant information are identified and placed on hold
        1. It is not sufficient to notify all employees of a litigation hold and expect that the party will then retain and produce all relevant information
            a. Counsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched
                i. This may include counsel becoming fully familiar with her client's document retention policies, and speaking with the key players in the litigation
    iii. Once a party and her counsel have identified all of the sources of potentially relevant information, they are under a duty to retain that information and to produce information responsive to the opposing party's requests
        1. Counsel should instruct all employees to produce electronic copies of their relevant active files
        2. Counsel must also make sure that all backup media which the party is required to retain is identified and stored in a safe place

<u>Negotiation and Transactional Matters</u>

I. Ex: "The Bad Builder's Good Lawyer": shows the interplay between Rule 4.1, 1.6, and 3.3 as far as confidentiality and disclosure to the tribunal goes
    a. Questions Raised:
        i. What there a violation of the ethical rules?
        ii. What is the relationship between a violation of the ethical rules and liability under the civil law (aiding and abetting a fraud, e.g.)?
        iii. Practical Constraints/Considerations – to what extent should the lawyer feel free to decline business because they are concerned about how they will look to other lawyers, or how other lawyers will come after them in the future
            1. Notion that another lawyer may not want to sue Lucy because she is in a shitty situation that other lawyers may not know how to get out of themselves

II. The "Bad Client" Questions
    a. Hierarchy (lowest to highest):
        i. **Rule 4.1(b)**: In the course of representing a client a lawyer shall not knowingly fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, *unless* disclosure is prohibited by Rule 1.6
        ii. Rule 1.6

1. If this rule applies (i.e., there are no exceptions to the duty of confidentiality applicable), then it trumps Rule 4.1(b)
2. But Rule 1.6 loses to Rule 3.3 …
    a. Suggesting that the highest duty is to the court – that is, if you are proceeding before a tribunal, truth to that tribunal is more important than confidentiality, more important than truth to third parties

iii. Rule 3.3: Candor Toward the Tribunal

1. (a) A lawyer shall not *knowingly*: make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer . . .
2. (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable measures, including, if necessary, disclosure to the tribunal
3. (c) These duties . . . apply even if compliance requires disclosure of information otherwise protected by Rule 1.6

b. A lawyer who discovers that a client is perpetrating a fraud or a crime on another cannot assist the client and will probably have to withdraw from the representation
    i. Rules 1.2(d) & 1.16(a)(1)

III. The Noisy Withdrawal
- a. A noisy withdrawal (in contrast to a silent one) is when a lawyer withdraws from the case and also disaffirms any opinions, documents, etc. that she gave, created, or filed during the representation
    i. Rule 1.2, Comment [10]: When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like
    ii. Rule 4.1, Comment [3]: . . . Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like . . .
    iii. The amendments to Rules 1.6(b)(2), 1.6(b)(3), and 1.13(c) have diminished the need for noisy withdrawal authority, because these exceptions allow more – full-blown revelation
        1. But noisy withdrawal offers a route less traumatic than revealing confidential information
- b. *If* under the substantive law of accessorial liability, the only way to avoid "assisting" the client's crime or fraud is by disaffirming a document that the client could continue to exploit, a noisy withdrawal is mandatory

IV. Questions About the Lawyer's Own Statements
- a. Rule 4.1(a) tells us that in representing a client a lawyer may not knowingly make a false statement of material fact or law to a third person
    i. But what is considered "false"?
        1. **OK (not false)**:
            a. "My client won't take less than $200K." – In fact, the client has authorized the lawyer to accept half that amount

b. "If you don't lower your price, my client will find a new supplier." – The client has told the lawyer that no one else can supply the particular product
c. "We are considering very serious charges." – In fact, the prosecutor says this to encourage cooperation and has no intention of charging the accused
i. This is a plan or statement about the future, a prediction

2. **Not OK (false)**:
a. "We have documentary proof of the claim." – None exists
b. "We have an eyewitness that will identify the accused." – None exists
c. "That benefit would cost the company $200 per employee." – In fact, the company lawyer in a labor negotiation knows it will cost only $20
i. Note: Pettit is not completely persuaded the ABA is right on this one

3. ABA's Reasoning: (1) When you are in a negotiation, no one believes the statements anyways – it just part of the game; (2) statements that are allowed are those about prospective behavior, intentions, etc. – not statements of existing facts
a. Rule 4.1, Comment [2]: Estimates of price and value placed on the subject of a transaction; a party's intentions as to an acceptable settlement of a claim; and the existence of an undisclosed principal (except where nondisclosure of the principal would constitute fraud) are all types of statements ordinarily not taken as statements of material fact

V. A Right to Rely?
a. Ex: *Fire Insurance Exchange v. Bell* (Ind. 1994): client sued the opposing counsel's lawyer for failure to reveal the scope of the insurance coverage; principal issue is whether, and to what extent, a party who is represented by counsel has the right to rely on representations by opposing counsel during settlement negotiations; court's opinion is guided by Rule 8.4(c), 4.1(a), and the Indiana Oath of Attorneys; ABA would consider this misrepresentation one of existing fact (not one as to future intention)
i. We decline to require attorneys to burden unnecessarily the courts and litigation process with discovery to verify the truthfulness of material representations made by opposing counsel
1. The reliability of lawyers' representations is an integral component of the fair and efficiency administration of justice
2. The law should promote lawyers' care in making statements that are accurate and trustworthy and should foster the reliance upon such statements by others
ii. We hold that Bell's attorney's right to rely upon any material misrepresentations that may have been made by opposing counsel is established as *a matter of law*
b. Ex: *Hansen v. Anderson* (Iowa 2001): upheld a claim by a lawyer against a lawyer
i. That is, when a client sues his own lawyer for malpractice for failing to protect him from an opposing lawyer's misrepresentation and the first lawyer then seeks indemnification from the opposing lawyer for any damages she is required to pay

VI. Legal Opinions
a. In treating the "what is false?" issue, must differentiate fact from legal opinion
i. A mistaken opinion, if negligent, may create malpractice liability to your own client
ii. A legal opinion may create liability because of facts that the opinion implies if those facts are false
b. Ex: *Hoyt Properties v. Production Resources Group* (Minn. 2007): appellants assert that the attorney's representations were statements of the attorney's legal opinion only and thus were not actionable

i. Holding: Two statements at issue were actionable because they were not expressions of pure legal opinion, *but* rather statements implying that facts existed that supported the legal opinion
ii. In order for the representations to be fraudulent, they must be made with knowledge of the falsity of the representation or made as of the party's own knowledge without knowing whether it was true or false (i.e., making a statement of fact knowing that you do not know the facts)

c. Ex: *Ausherman v. Bank of America* (D. Md. 2002): confirms that just because you are in negotiations does not mean you can lie about factual things

VII. Duty to Correct Opponent's Mistake?

a. Should a lawyer have any duty to correct a misunderstanding or mistaken belief that neither the lawyer nor his client created?
i. Remember that comment [1] to Rule 4.1 contains this foreboding warning: *"Misrepresentations can also occur by … omissions that are the equivalent of affirmative false statements"*
1. So silence does not necessarily equal immunity
ii. Most lawyers would advise you to just let the opponent's mistake work in your favor

b. Video: inexperience lawyer who knows the prosecutor from a law school ethics lecture is making a ton of mistakes; can you tell the inexperience lawyer he is making a ton of mistakes (without identifying them) and that he needs to get help? Do you have to ask your client first?
i. The Model Rules themselves do not offer much guidance
1. Could we try to make a means/objectives distinction here to place the decision making authority in the lawyer's control?
ii. Gillers thinks that something should be allowed here – where this is an obvious injustice (to the lawyer's client, etc.)
iii. Posner thinks that if you are trying to do the ethical and morally right thing, you may lose clients, but you should not be punished

c. Ex: *Virzi* (E.D. Mich. 1983): lawyer failed to reveal client's death
i. Holding: Attorney had an absolute ethical obligation to inform opposing counsel and the court, prior to concluding the settlement, of the death of his client; court set aside the settlement
1. Court cites *Spaulding v. Zimmerman*, where the court found that there was no duty on D to voluntarily disclose their knowledge during the course of negotiations, when the parties were in an adversarial relationship, but that a duty to disclose arose once the parties reached a settlement and sought the court's approval (because P was a minor)
a. And this case falls within *Spaulding* to the extent that a tribunal was involved regarding the settlement
2. By not informing the court of P's death, or filing a motion to substitute parties, P's attorney led the court to enter an order of settlement for a nonexistent party

d. What Does *Virzi* Stand For?
i. Ex: *State v. Addison* (Neb. 1987): pedestrian hit when two cars collided; client's medical bills $112K; one driver had a policy of $100K and a second policy of $1M; other driver had a policy of $55K; when negotiating with the hospital, the lawyer learned that the hospital was ignorant of the second policy of $1M and he negotiated with them without revealing that information
1. Court: Lawyer did have a duty to disclose the second policy
2. Pettit: This mistake was not based on anything the lawyer did, whereas in *Virzi* the lawyer implicitly represented that the client was alive by going forward
a. These two results are hard to reconcile
b. Seems like Pettit not comfortable imposing a duty here

ii. Lawyer rejected a settlement, then after a deposition realized his client had lied and tried to accept the rejected settlement before things got worse
    1. Court: The lawyer had a duty to disclose this fact
        a. Rule 3.3 is triggered – even if your client says something false in a deposition, the lawyer has a duty to bring the truth to light
    2. Pettit: Feels better about imposing this duty than in the prior example
        a. The lawyer knew there was a false deposition answer given and he is trying to effect a settlement with this falsity on the record
iii. P's lawyer demanded retroactive pay at level "C"; the county accepted the offer; P's lawyer then learned that P's starting salary would have been level "D," which is higher; when accepting the settlement, the county's lawyer did not know, but thought it likely, that P's counsel had mistakenly assumed that level "C" was the higher pay level possible
    1. Court: No duty – absent some misrepresentation or fraudulent conduct, the appellant had no duty to advise the appellee of any factual error, whether unknown or suspected
        a. The mere nondisclosure to an adverse party and to the court of facts pertinent to a controversy before the court does not add up to 'fraud upon the court' for purposes of vacating a judgment
    2. Pettit: This case does not appear to be distinguishable from *Addison* – in both cases the attorney can allege that they did not say anything, they thought you were making a mistake, but they didn't *know* . . . so it is your problem
iv. Pros negotiated a plea bargain with a defense lawyer although, as the pros knew but the defense lawyer did not, the victim of D's crime had since died of unrelated causes; after case has concluded, defense lawyer finds this out and files a motion to vacate the conviction on the basis that the state could not have proved its case
    1. Court: Pros had no affirmative duty to reveal the victim's death
        a. Pros has to disclose exculpatory evidence to the other side, but this is not exculpatory evidence – it is just the strength of their case
            i. Pros has no affirmative duty to reveal tactical weaknesses in their case
                1. Record contained no proof of an affirmative misrepresentation

e. Ex: "The Case of the Complex Formula"
    i. Must Kate alert the wife's lawyer of the error in the formula?
        1. Would not violate Rule 4.1 or Rule 3.4
        2. Would violate Rule 3.3 only if the court has to approve the settlement and the parties express reliance on the formula in coming to the settlement amount
    ii. Kate should bring the error to her client's attention and let her know that if the other side catches the error they will be very upset and might try to rescind the settlement
        1. Should advise the client about the potential downside to taking advantage of this mistake
            a. The court may reform the settlement to a price that is lower than the parties might have agreed to initially
    iii. What if the client refuses to disclose the error, can Kate disclose anyways?
        1. Rule 1.2(a) – client's decision to accept or reject a settlement offer
        2. Gillers thinks that Kate should have the authority to do this when it is a clear mathematical error (i.e., not a strategy mistake), and should not have to have her client's permission
    iv. Rule 4.1, Comment [1]: "Misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false"
        1. Counter: Lawyer would argue that he was not incorporating or affirming the statement – rather, he was just agreeing to the final suggested settlement price

VIII. Transactions with Unrepresented Persons

a. Rule 4.3: Dealing With Unrepresented Person

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

ii. Comment [2]: . . . So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's over view of the meaning of the document or the lawyer's view of the underlying legal obligations

. . . and therefore won't violate Rule 4.3 re: "not giv[ing] legal advice"

b. Ex: *Florida Bar v. Belleville* (Fla. 1991): when faced with this factual scenario, we believe an attorney is under an ethical obligation to do two things:

i. First, the attorney must explain to the unrepresented opposing party the fact that the attorney is representing an adverse interest

ii. Second, the attorney must explain the material terms of the documents that the attorney has drafted for the client so that the opposing party fully understands their actual effect

1. When the transaction is as one-sided as this one, counsel preparing the documents is under an ethical duty to make sure that an unrepresented party understands the possible detrimental effect of the transaction and the fact that the attorney's loyalty lies with the client alone

a. Gillers: How far does this go?!

i. Line drawing problems: is this only when drafting makes it clear that the agreement is so unconscionable? or every time an attorney drafts a document when the opposing party is unrepresented?

iii. BUT FN 2: "We limit this holding to the facts of this case" = no precedential value

iv. Rule 4.3, Comment [2]

IX. Negotiating with an Unrepresented & Dangerous Fugitive

a. Rule 4.3: Dealing with Unrepresented Person

b. Rule 8.4(c): It is professional misconduct for a lawyer to: engage in conduct involving dishonesty, fraud, deceit, or misrepresentation

c. Court suggested that the D.A. could temper the consequences by immediately notifying defendant once he turned himself in (i.e., was no longer a threat to public safety)

X. Threatening Criminal Prosecution or Discipline

a. Code of Professional Responsibility: DR-7105(A): A lawyer shall not present or threaten to present criminal charges solely to obtain an advantage in a civil matter

i. One of Pettit's favorite rules

b. Model Rules did not carry this idea over though

i. Notion is that you have a right to report crime, so it is not unethical to threaten to do what you have a right to do

1. *But*, if it is a wrongful threat (and there is no legitimate criminal charge that could be brought), then we are talking about extortion

ii. Counter: Doing so is a misuse of power – misuse of the criminal law – to threaten to exercise this right

Lawyers for Companies and Other Organizations

Sarbanes-Oxley and the Rule 1.13 Amendments

I. As a result of SOX, the Model Rules amended Rules 1.6(b)(2), 1.6(b)(3), and 1.13
    a. And these amendments appear to have been successful, because the SEC did not do any more than was minimally required by the Act
        i. The amendments to Rule 1.6 expanded the exceptions under which a lawyer is permitted to reveal client confidential information to third persons
        ii. The amendments to Rule 1.13: (i) strengthened the reporting up obligation – it is presumptively required unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so; and (ii) added its own exception to confidentiality – it permits, but does not require, reporting out if, after reporting up, the highest authority insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of the law, and if the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization
    b. Questions about whether the amendments went far enough . . .
        i. Rule 1.6 uses "may" – not "shall"
        ii. Rule 1.13(b) uses "shall" … but look at all the qualifiers
        iii. Rule 1.13(c) uses "may" … plus all the qualifiers
        iv. Model Rules wanted to ensure the SEC would back off, while keeping as much confidentiality and as few duties as possible
II. Reporting Up → Reporting illegal behavior or breach of fiduciary duty up the corporate chain of command
III. Reporting Out → Reporting to people (usually authorities) outside of the corporation/corporate client

Avoiding and Redressing Professional Failure

<u>Control of Quality: Reducing the Likelihood of Professional Failure</u>

Questions re: Restrictions & Requirements

I. If they are supposed to ensure competence and protection of the public, how well do they do that?
II. How cost effective are these things (bar exam, e.g.)?
III. What are the motives behind – to protect the public? To protect lawyers? To limit competition?
IV. Maybe the goal is noble – to try and achieve an ethical as possible profession – but the method is problematic?
V. Do we harm the public by not letting capable lawyers become capable lawyers based on character inquiries based on past facts?

Admission to the Bar

I. Education and Examination
    a. If there is one institution that has resisted all efforts to end it, it is the bar exam
        i. No one seriously believes that a bar exam is a perfect way to test knowledge or ability to practice law
            1. Even those charged with examining bar applicants probably recognize the rough justice the exam delivers
        ii. The trouble is, no one has advanced a persuasive substitute or been able to convince state courts and legislatures to do away with it
    b. A state has an interest in assuring that those whom it holds out to the public as competent are competent, at some level
        i. The exam and the license give the public confidence in lawyers
II. Character Inquiries
    a. Key → Disclose Everything!
    b. Ex: "Shattered Glass": law student-author who lied in his 27 published stories and eventually got found out; should he be admitted to the Bar?
        i. He was not forthcoming when he was presented with this, and he continued to cover up
            1. Several of the MRPC discuss honesty in front of other tribunals and lawyers

2. Notion that people who are dishonest in the past are likely to be dishonest in the future
    a. But, remember that in evidence we cannot use propensity inferences

ii. Are we focusing on the likelihood of violating a MRPC in the future, or are we punishing him for what he's done in the past, or are we trying to protect the Bar?
1. What does it ultimately come down to?

iii. One critique has been that Bar Committees are elitist
1. What do you have to do to join the club?
2. There is a lot of discretion on their part
3. They are a lot of intrusive questions . . . is this justified?

iv. One suggestion has been to have compensation funds that are reserve for clients if they suffer from their lawyer's violations
1. Is this a better way to go or do we want to try and stop these loses in the first place?

c. Ex: *In re Mustafa* (D.C. 1993): D.C. Bar Committee recommended that he be admitted, despite his law school money incident; Factors: he paid the money back and he always intended to pay the money back, he fessed up once he was caught, he told his employer, and he had several letters of recommendation; D.C. Court decides no admission now, but at some point in the future he might be admitted; Epilogue – defendant was eventually admitted, but was later charged with fraud, commingling fees, ignoring client matters, and misappropriating funds for his personal expenses (so maybe past behavior is an indication of future behavior)

i. Applicant has the burden of proof to show good moral character and fitness
1. Standard: clear and convincing evidence
    a. More than preponderance, but less than beyond a reasonable doubt

ii. Factors for No Admission:
1. His conduct was analogous to that which would require disbarment – misappropriating entrusted funds
2. His conduct was also criminal – he violated the criminal law by stealing
3. Not enough time has passed, so he must wait

iii. Options, in general:
1. Immediate Admission
2. Wait (Compromise)
3. Never

d. <u>Frequently Cited Grounds for Delaying or Denying Admission to the Bar</u>

i. Criminal Conduct
1. States examine the nature of the crime, how long ago it occurred, and the applicant's conduct thereafter
2. Criminal conduct can exclude applicants to the bar, whether or not it has led to a conviction
    a. Even an acquittal will not prevent the conduct from being weighed in the admission process
3. One applicant had not paid 200 parking tickets and that counted against him

ii. Lack of Candor in the Application Process
1. Preapplication conduct that would not result in exclusion can lead to exclusion if the bar applicant *consciously* omits it from the application
2. If falsity on an application is discovered after admission, the lawyer can be censured, suspended, or disbarred
3. The fact that a criminal conviction has been expunged is not generally a ground for omitting it from the application without express permission to do so

iii. Dishonesty or Lack of Integrity in Legal Academic Settings
1. Academic cheating – LSAT, law school exam, bar exam, plagiarism – can lead to delay or denial of admission

iv. Mental Health

1. Lawyers have occasionally been excluded from the Bar not for anything they did but because of what others predicted they might do based on their mental health history
2. The Americans with Disabilities Act (ADA) appears o have changed the rules
    a. A handful of opinions have now held that the ADA applies to bar applications and that certain questions once asked are now prohibited

v. Financial Probity

1. Dishonesty or abuse of trust in business or personal financial matters may predict lack of probity as a lawyer
2. Filing bankruptcy is not a reason for denying admission
    a. But, not satisfying your financial obligations during the pre-bankruptcy period, when you are employed and able to so do so, is
3. An applicant may be rejected because of an inability to handle personal finances so long as bankruptcy is not the sole reason for the rejection

vi. **Ability to Speak English**

e. Procedures Regarding Character Inquiry
    i. Applicants to the bar who are denied admission because they lack good moral character are entitled to a hearing, at which they can present evidence and confront the evidence against them
        1. And applicant is generally viewed as bearing the burden of showing the presence of good moral character
f. Ex: "The Racist Bar Applicant"
    i. Applicant here is calling for a physical war – not just an ideological war – and that makes this an easier case
        1. You cannot be inciting violence
    ii. If this was just a call for an ideological war, this might be a closer case
        1. Concern we do not want to punish someone for their beliefs
    iii. We <u>will</u> deny you based on your beliefs, only in so far as they affect your responsibilities as a lawyer in our community
    iv. Dissenting judge expressed propensity concerns – that is, there is no empirical support for this type of argument that if you've sinned once you'll be dishonest later … it is just speculation/assumptions

<u>Control of Quality: Remedies for Professional Failure</u>

Acts Justifying Discipline

I. Dishonesty and Unlawful Conduct
    a. Bar Committees are <u>very</u> intolerant of mishandling or misuse of clients' money
        i. Using escrow money accounts for a substantial amount of discipline nationwide
            1. Lawyers are required to place funds that belong to others, or to which others have a claim, in trust accounts (even if the lawyer also has a claim to the money)
            2. It is unethical to commingle trust funds with one's own money and, even worse, to make actual (even if "temporary") use of trust funds
            3. Rule 1.15: Safekeeping Property
                a. (a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account . . . Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation

b. (b) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account
c. (c) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred
d. (d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person . . .
e. (e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved . . .

b. Ex: *In re Warhaftig* (N.J. 1987): attorney had a cash flow problem because: (i) the housing market caused a decline in his real estate practice, (ii) his wife was undergoing costly cancer treatments, and (iii) his son had psychiatric problems; this caused the attorney to issue checks to himself in advance of when the funds were received for real estate closings – so the attorney eventually had a colorable interest in these funds, but not at the point he was taking them; this was knowingly wrongful conduct though
    i. Defense: no one was ever hurt by my borrowing; no loss in any clients' accounts; no delay in clients' ability to get money; took steps to make sure no one would ever be hurt; kept written records of my borrowing; borrowed only because of cash flow problems beyond my control
    ii. N.J. Bar Committee drew a distinction between classic, knowing misappropriation of clients' funds and respondent's conduct – premature withdrawal of monies to which he had a colorable interest
        1. Recommended public discipline/censure – proclaiming the violation to the world, but not suspending him from practice
    iii. Court does not agree with the distinction drawn below
        1. *Knowing* misappropriation (i.e., not accidental or merely negligent) consists simply of a lawyer taking a client's money entrusted to him, knowing that it is the client's money and knowing that the client has not authorized the taking
            a. <u>A lawyer's subjective intent, whether it be to borrow or steal, is irrelevant to the determination of the appropriate discipline in a misappropriation case</u>
        2. Respondent is disbarred (and in New Jersey that means forever)
            a. Mitigating Factors that were Insufficient to Prevent Disbarment:
                i. Unblemished record
                ii. Small amount of money
                iii. No one was hurt
                iv. Money was going to come to him eventually
                v. Family problems
            b. Court's Reason for this Very Strict Rule:
                i. Analogy → Banks do not rehire bank tellers who "borrow" depositors' funds
                ii. Our professional standards, if anything, should be higher
                    1. Lawyers are more than fiduciaries; they are representatives of a profession and officers of this Court
                iii. Temptation can be great and the rationalization can be easy
    iv. Lessons:
        1. Lawyers will <u>not</u> get away with this kind of stuff
            a. It is very easy to detect: audits, bank records, client complaints, e.g.

2. If it is detected, it is very easy to prove

c. Ex: *In re Austern* (D.C. 1987): shady real estate closing and empty escrow account that the lawyer knew about; court decides that the timing is irrelevant – found that the lawyer knew before everyone signed the closing that the bank account had no funds; court finds a harm here on the basis that for two months the opposing side was under the impression it was adequately protected by the escrow money and in fact it was not (despite that fact that no claims arose during this two months); result: public censure
    i. Rule 1.2(d): A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent . . .
    ii. Court said the attorney had an affirmative duty to withdraw, presumably even if that hurt the client's interest
        1. Rule 1.16(a)(1): A lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if the representation will result in violation of the rules of professional conduct or other law
        2. Rule 1.16(b)(2): A lawyer *may* withdraw from representing a client if the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent
        3. Rule 1.2, comment [10] noisy withdrawal
d. Deceit, Dishonesty, Etcetera
    i. Inflating bills to clients – e.g., billing time that was not actually spent on the client's matter – can lead to criminal prosecution as well as discipline
    ii. Lawyers sometimes defraud their own partners and law firms
        1. Seeking reimbursement for false expenses, e.g.
    iii. Lying or misleading omission on a resume will also bring discipline
    iv. A lawyer who violates a fiduciary duty owed to a non-client or deceives a person who is not a client may nevertheless be disciplined
        1. A lawyer may be disciplined for conduct she engages in as a businessperson because the lawyer continues to be bound by the ethical responsibilities that apply to lawyers
    v. Recording a conversation with an unsuspecting person?
        1. ABA
            a. Originally said it was unethical, whether it was illegal in the state or not
            b. Now the ABA says it is OK, as long as it is not illegal in the state
                i. If it is illegal and you do it, you are violating:
                    1. Rule 8.4(b) – professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects
                    2. Rule 8.4(c) – professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation
                ii. ABA thinks it is even OK to secretly record a conversation with your client
        2. Note: It is illegal to record a client's conversation without consent in Massachusetts
    vi. Although courts are quite strict when lawyers steal law firm or client money, they are remarkably lenient when a lawyer has been convicted of "stealing" the government's money through conscious failure to pay taxes
        1. The former involves a lawyer's duty to a client (*In re Warhaftig*, e.g.)
        2. The latter involves a lawyer's public duty

a. The Bar is much more concerned about lawyers' failure to fulfill their duties to the legal system and clients than their public duties

vii. Sting Operations

1. Private lawyers who conduct "sting" operations to get information they think will help their clients – and which indeed might help their clients – engage in deceit (a.k.a. pretexting)
    a. Ex: A lawyer posing as a journalist to get answers from a hostile witness for the other side
        i. Have we not violated the spirit, if not the letter, of Rules 4.2 and 4.3?
        ii. Rule 8.4(c) – professional misconduct to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation
2. Prosecutors and other government lawyers who file false documents with the court or instruct witnesses to lie will be disciplined, even if the conduct is part of a government "sting" operation or an effort to protect an undercover informant
    a. Rule 8.4(c)
    b. Rule 8.4(d) – professional misconduct to engage in conduct that is prejudicial to the administration of justice
        i. One court noted: The respondent's responsibility to enforce the laws in his judicial district grants him no license to ignore those laws or the Model Rules
3. BUT, it seems OK for a government anti-discrimination agency who wants to uncover discrimination to have someone pretend they are looking for an apartment only to see if the landlord will turn them down because of discrimination
    a. How far should prosecutors be allowed to go?
        i. Setting up a fake drug buy seems OK
        ii. Staging a phony arrest of an informant to protect the status of the informant is not OK
        . . . is this an arbitrary line to draw though?

II. Neglect and Lack of Candor

a. The likelihood of discipline increases as the number of neglected matters increases
    i. *Neglect* – doing nothing – should be distinguished from *negligence* – not meeting the standards of the profession
b. Neglect, lack of candor, or outright sloppiness in a submission to a court can result in a sanction directly by the court, bypassing the disciplinary committee
    i. Ex: a lawyer misstating the record will violate Rule 3.3 – Candor Toward the Tribunal
c. Need to:
    i. Keep in communication with your clients
    ii. Communicate to them that you care about their problems
    iii. Be nice to them
    iv. Do not over extend your practice
    v. Have a double-check system to make you do not miss deadlines

III. Sexual Relations with a Client

a. Some states have adopted specific rules forbidding lawyers to commence an intimate personal relationship with a client during a representation
    i. Other states have relied on conflict rules or other generic rules to punish such behavior
b. Ex: *Matter of Tsoutsouris* (Ind. 2001): attorney engaged in a sexual relationship with his client which he was handling her divorce; attorney argues the relationship was not improper because there was no specific rule at this time about having sexual relationships with clients in his state (and this is true), so he was not on notice that he should not be doing this; he also alleges that it

had no impact on the quality of services to the client and this is shown by the fact that she hired him again after the sexual relationship had ended

i. Court took issue with the fact that the attorney did not inform the client how a sexual relationship between them might impact his professional duties to her or otherwise affect their attorney-client relationship
    1. But FN 2 suggests that informed consent from the client would not have mattered for this court
        a. Notion that can a relationship be truly consensual when a lawyer is representing a client at serious risk and dependent on the lawyer
ii. Court relies on Rule 1.7(a)(2): A lawyer shall not represent a client if the representation involves a concurrent conflict of interest, which exists (e.g.) if there is a significant risk that the representation of a client will be materially limited . . . by a personal interest of the lawyer
    1. So this constituted an impermissible conflict
iii. Risks with Client Sexual Relations:
    1. Exploitation of the lawyer's dominant position
    2. Coercive under the circumstances
    3. If it is a matrimonial matter, a sexual relationship could result in alimony and custody losses, e.g.
    4. Lawyer might seek to resolve the matter in a way to preserve the sexual relationship, which might not be in the best interests of the client's legal needs
    5. Impendence of his judgment may be compromised
    6. Risks to the attorney-client privilege
        a. If confidences are revealed not in the course of the representation, but in the course of the relationships then they are not privileged
            i. Hard to figure out where one begins and one ends
iv. **Rule 1.8(j)**: A lawyer <u>shall not</u> have sexual relations with a client *unless* a consensual sexual relationship existed between them when the client-lawyer relationship commenced
    1. Comment [17] – policy of the rule
    2. Comment [18] – sexual relationships that predate the client-lawyer relationship are not prohibited, but need to consider whether the lawyer's ability to represent the client will be materially limited by the relationship [Rule 1.7(a)(2)]
        a. Model Rules were concerned with preventing spouses from representing each other (but they could not say that explicitly because it might be considered discrimination on the basis of marital status)
        b. Despite the Rule's allowance, there might still be problems representing your spouse
    3. Comment [19] – when the client is an organization, a lawyer for the organization cannot have sexual relations with a constituent of the organization who supervises, directs or regularly consults with that lawyer concerning the organization's legal matters
        a. Some people view this situation as different than a one-on-one situation (lawyer : client)
        b. Pettit does not see this situation as problematic as a one-on-one situation
            i. But we must still advise against it because courts will likely continue to follow comment [19]
    4. Note: This Rule was just a proposal when *Matter of Tsoutsouris* was decided, but the court took note of it
v. Court also relies on Rule 8.4 – misconduct to engage in conduct that is prejudicial to the administration of justice

vi. Court suspended the lawyer for 30 days
    1. Mitigating Factors:
        a. He was in good standing for the past 33 years
        b. The client hired the lawyer multiple times after the sexual relationship had ended

c. Do we agree with Rule 1.8(j) – a hard and fast rule?
    i. Isn't there freedom of association and a right to privacy?
    ii. Would we want to limit the rule strictly to domestic relations matters, where the most problems have been?
    iii. Rule 1.8(j) is a per se rule making it unethical – no need to show harm to the client or legal services
        1. Maybe we should have an informed consent rule + showing of harm required (versus per se rule and no harm required)
            a. Informed consent would allow a competent adult to make the choices he wants, and no harm, no foul
            b. Informed consent would at least have the benefit of assuring everyone that the client was on notice before entering into the sexual relationship during the pendency of the legal one
                i. Is it possible to get meaningful informed consent?
                    1. At the least the lawyer should go through the risks to alimony, custody, privilege, etc.

d. Video – GC Sexual Harassment
    i. Rule 1.13(b) – Does the attorney ***know*** anything?
        1. He must ***know*** that Jack will do one of these things that will cause the attorney to have to respond
            a. That said, we might not be completely comfortable advising the attorney he does not have to do anything because of lack of knowledge
                i. If something happens later, that is not a good situation
    ii. Might be some risk that Jack is putting the company at risk for civil liability
    iii. Is Jack (GC) violating Rule 8.4?
        1. Rule 8.4, comment [3] might be a stretch
            a. Does anti-discrimination include sexual harassment, if it is not specifically named?
        2. Stronger proposals were made to the ABA but not voted through
            a. Strongest was adding "(g): commit a discriminatory act or to harass a person on the basis of sex"
        3. Various states have added to Rule 8.4
    iv. If Jack is violating a Model Rule, does that create a duty for the attorney?
        1. Rule 8.3 – reporting professional misconduct that raises a substantial question as to that lawyer's *honesty*, *trustworthiness*, or *fitness* as a lawyer in other respects
            a. Need to consider whether there is a "**substantial question**"
            b. Need to consider whether the misconduct relates to the lawyer's "**honesty, trustworthiness, or fitness**"
    v. What if the attorney talked to the President of the company about Jack and the President said he does not think this is a problem, but the attorney thinks the President is motivated by the fact that Jack is very valuable to the company and does not want to lose him?
        1. Attorney could talk to Jack, but there is a fear Jack might fire him
            a. It does not appear that Rule 1.13(e) protects the attorney – that is, it does not say that the company cannot discharge you for taking action under the Rule

b. Apparently the attorney's obligation is to the organization and he must do what he thinks is best for the organization, as opposed to doing what he thinks is best for his own professional security

2. Go to the Board
3. Say you've done all you need to do under Rule 1.13 and 8.4

e. Video – Partner Makes Advances to an Associate
   i. Associate does not appear to have done anything wrong
   ii. There is some disagreement about whether the advances made by the partner amounted to sexual harassment
   iii. What if the partner said he could not work with the associate after she denied him because it was best for the client (i.e., need the best working relationship to provide the best services for the client)?
      1. We're not buying this
      2. He should be able to provide legal services despite any professional discomfort he might have
   iv. Could the law firm have done anything to prevent this?
      1. Controls over assigning cases to associates perhaps
         a. An institutional way of assigning cases rather than the supervisor just saying – no I don't want her working for me
   v. Should law firms bar office romances?
      1. If it is barred it may occur secretly, and this might be worse than everyone having knowledge
      2. Could be line drawing problems – not in the same department? Not supervisors?

IV. The Lawyer's "Private" Life and Conduct Unrelated to Clients
   a. To what extent should a lawyer's behavior unrelated to the practice of law be a basis for discipline from the Bar?
      i. Justification for saying that if a lawyer does something bad – criminal or otherwise – he can be disciplined as a lawyer:
         1. A lawyer is more likely to violate the Model Rules having shown this bad behavior before
         2. The Bar does not want to present to the public lawyers who have engaged in wrongdoing
            a. This is bad for the Bar and for public confidence in the Bar/lawyers
      ii. Notion that if you are going to break the laws, then you should not be licensed to protect or enforce them
      iii. Examples:
         1. Tax crimes
         2. Leaving the scene of a fatal car accident
         3. All felony convictions (in some states)
         4. Drug offenses
         5. Not paying support obligations
         6. Viewing porn on office computers
         7. Domestic violence

V. Note: The most frequent contact you will have with the Model Rules will be dealing with conflict situations – *but*, not a large number of disciplinary cases come down the pike for this
   a. What are lawyers most frequently disciplined for?
      i. Neglect of Client Matters
      ii. Mishandling or Misuse of Clients' Money
      iii. Conviction of a Crime
      iv. Alcohol & Drug Problems (that often lead to the aforementioned situations)

General Advice about Dealing with Problems of Legal Ethics

I. Problems of legal ethics can be the most serious problems you face as a lawyer
    a. But often, the rules and the law are not clear about what you should or must do, or what your best option is

II. **Awareness** – need to be aware of what the rules are
    a. Ex: get on the distribution list of ABA opinions in your jurisdiction
    b. There may be rules or best practices for specialized areas of practice
    c. Ignorance of the law is no excuse

III. **Time** – when you are presented with a problem, try to make an early assessment of when you have to make a decision
    a. If there is time, take the time
        i. Sometimes problems will go away by themselves
        ii. Sometimes there will be future factual developments that will be relevant to what you should do
    b. Do not procrastinate if you know you have to decide quickly or that waiting will make things worse

IV. **Procedures** – you should know: are there established procedures at the law firm or company for dealing with ethical problems?
    a. If they are there, they can be helpful and can protect you to some extent … but they are not a defense – you as a lawyer are still responsible for your conduct

V. **Mentor** (Trusted Adviser) – look for someone who you think you might go to for advice that you can trust and who has good judgment
    a. Make it clear that you are seeking advice for complying with the law or the rules of ethics … to preserve confidentiality
    b. Benefits and disadvantages to having someone inside or outside of the firm

VI. **Advisory Opinions** – published, formal opinions from the ABA and also by state and local bars
    a. Not law, but are often cited and relied on by court
    b. May be able to request an advisory opinion for your own problem – need to know how long this process takes though
    c. Could see if you can call and speak to a staff lawyer for guidance

VII. **Legal Research** – research bar opinions and judicial decisions dealing with our problem
    a. There is a RST of the Law Governing Lawyers – not binding, but persuasive

MISC.

ALWAYS ASK → former or current client?

Unsure of what to do?

One option could always be to ask the client

-to tell someone else something . . . so the lawyer does not risk breaking confidentiality (the case where lawyer had two clients – one was not telling the other he had AIDS)

-if it is OK the lawyer does something – get informed consent (consent, disclose to save someone's life, e.g.)

Rule 1.7, Comment [34]: A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary.

Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, *unless* the circumstances are such that:

-the affiliate should also be considered a client of the lawyer,

-there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or

-the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client

Rule 1.8(b): A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules

So there is no direct rule preventing lawyers from using information for the lawyer's advantage, but that clearly does not disadvantage the client

In cases of doubt, though, get informed consent from the client

Rule 4.2: Communication With Person Represented By Counsel: In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order

Rule 4.3: Dealing With Unrepresented Person: In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

Rule 8.3(a): A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a *substantial question* as to that lawyer's *honesty, trustworthiness, or fitness* as a lawyer in other respects, shall inform the appropriate professional authority

Need to consider whether there is a "substantial question" (i.e., does it rise to this level?)

Need to consider whether the misconduct reflects on the lawyer's "honesty, trustworthiness, or fitness"

Rule 8.4: It is professional misconduct for a lawyer to:

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

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer

(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation

(d) engage in conduct that is prejudicial to the administration of justice

(e) state of imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law

Pedro Problem (*See* Class Notes from Feb. 22nd)

We should inform Pedro about facts that arise in his case and how they bear on the viability of success at trial

We would probably want to also tell Pedro not to talk to or influence Christina

We can ethically talk to Christina, as long as she is not represented by counsel

Need to make sure to clarify our position when talking to witnesses though – do not want them to misconstrue anything

We cannot tell Christina to make herself unavailable to the prosecutor, but if she asserted her privilege against self incrimination she would essentially be unavailable (and this would help Pedro's case)

However, we cannot tell her to assert this privilege because that would violate Rule 4.3 – the lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel

We can tell her that she has a legal issue that we cannot help her with, but that she should/could seek legal advice

Model Rules do not prohibit you from giving this third party names of people you recommend

OK to discredit a witness's testimony even though you know the facts she is testifying to are true

There are ways to frame the questions appropriately (i.e., the evidence only shows vs. stating the question like it is a fact)

Why can a lawyer present exculpatory evidence (provided it is not false), even if they think their criminal defendant client is guilty?

A lawyer's role is as an advocate – not to make decisions of guilt or innocence

Rule 3.1: . . . A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless do defend the proceeding as to require that event element of the case be established

Comment [3]: The lawyer's obligations under this Rule (i.e., meritorious claims and contentions) are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule