

# LEGAL PROFESSION

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## THE DUTY OF COMPETENCE

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### RULE 1.1

#### Text

- A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

#### Comments

- [1] What constitutes legal knowledge and skill
  - often that of a general practitioner
  - expertise may be required in some circumstances
- [2] Special training or prior experience not always needed
  - “Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve.”
- [3] Emergency circumstances
  - lawyer may advise or assist when he does not have the skill ordinarily required when:
    - referral/consultation with another lawyer is impractical
  - limit assistance to what is “reasonably necessary under the circumstances”
- [4] Reasonable preparation → can accept representation
- [5] Required attention and preparation varies
- [6] Maintain competence
  - “keep abreast of changes in the law and its practice”
  - continue study and education; CLEs

#### Case law

- *In re Docking*, Kan. 1994 (27)
  - Atty with no prior felony-trial experience represented three Korean codefendants in a felony trial despite their conflicts of interest. Court found that atty lacked required competence.
    - **Should have associated with a more experienced attorney**
    - **Should have had an interpreter at all meetings**
  - *Public censure*

- *Ethics Committee of Iowa v. Miller*, Iowa 1987 (30)
  - Atty took on a probate matter without having any idea what he was doing and let it languish for six years.
    - → atty incompetent.
  - Disciplinary action: Ethics Committee sent atty three letters but received no response.
    - → failure to cooperate with commission
  - *Suspension for three months*
- Charging a client for case-specific research or familiarization with a unique issue involved in a case is OK (31)
  - general education or background research should not be charged to the client.

## MALPRACTICE

### Elements of malpractice

- *Treated as a tort claim—ordinary negligence*
- **(1) Existence of atty–client relationship** (*creation of duty*)
  - May occur from retaining atty for advisement, *Lopez* (32)
  - *See infra*
- **(2) Breach of a duty** (*act or omission*)
  - Prima facie negligence to misadvise a client on a settled point of law verifiable by ordinary research techniques, *Lopez* (32)
  - Often established via expert testimony
  - Violating MPRE ≠ breach of a duty
- **(3) Proximate causation**
  - Not superceded in *Lopez* (failure to explain SoL) by another atty that “did not undertake any representation” of the client
- **(4) Damages**
  - Generally cannot recover punitive damages
  - Generally no recovery of attorneys’ fees
  - When malpractice deprives client of CoA:
    - damages = what would have gotten if claim preserved
    - proof of damages = proof client would have won suit
      - in criminal case, must prove innocence in fact, *Ang* (52)
        - acquittal not enough
        - preponderance
- *Malpractice insurance reqd only in Oregon, but disclosure of ins increasingly reqd*

**Who may sue**

- Clients
- Intended beneficiaries of contracts/wills
  - foreseeability of harm

**Who may *not* sue**

- Cocounsel may not sue each other for loss of expected fees, *Mazon (47)*
  - conflict-of-interest concerns
  - discretionary and tactical decisions could become basis for suit
    - would erode public confidence in the legal system
    - cocounsel should back each other up

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## THE ATTORNEY-CLIENT RELATIONSHIP

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### FORMING THE RELATIONSHIP

#### The accidental client

- **Client's reliance on advice may be enough**, *Togstad v. Vesely*, Minn. 1984 (84)
  - Atty told client the claim was no good; didn't mention SoL. Client didn't look into the claim further and claim ultimately expired under SoL.
- **Reasonable-person standard in place of the client**
  - Putative client's belief that there is an atty-client relationship must be reasonable
- **An attorney-client relationship may be implied when:**
  - (1) A person seeks advice or assistance from an attorney
  - (2) Which pertains to matters within the atty's professional competence
  - *and* (3) Atty expressly or impliedly agrees to give or gives the adv/assistance
    - *Devaux v. Am. Home Assurance Co.*, Mass. 1983 (90)
      - **May be implied through the actions of a lawyer's staff**
      - Client contacted atty's sec'y; sec'y gave advice and arranged medical exam; told client to write letter to atty; client did but sec'y misfiled the letter; not found until after SoL ran.
- **Individual's subjective expectation ≠ create atty-client relationship**, *Manion v. Nagin*

#### The entity client

- *Rule 1.13*
- *Manion v. Nagin*, 8th Cir. 2005 (93)
  - **Atty should make clear from the outset whether he represents the individual or the business.**
    - Atty helps individual to form entity & entity is formed → atty deemed retroactively to have represented entity
  - Manion hired Nagin to help him organize a buying group, BDA. BDA eventually terminated Manion. When Manion learned Nagin had told the BDA Finance Committee to look for addl grounds to fire Manion, Manion asked Nagin who he represented. Nagin replied: BDA.
    - Hadn't previously mentioned who he represented
    - Manion's suit against Nagin dismissed

**Insurer and insured**

- **The client is insured party, not insurer**, even though insurer may choose atty.  
**Insurer may become client if:**
  - Insured gets consult
  - Insured gives informed consent
  - *if no conflict between insurer and insured*
- *Pine Island Farmers Coop v. Erstad & Riemer*, Minn. 2002 (98) set down this bright-line rule, but varies by jurisdiction
  - Sharing info with insurer doesn't create atty-client relationship (101)
  - See Rule 5.4(c) (professional independence of attorney)
  - *Dissent: bright-line rule is unhelpful when interests of insurer and insured are aligned; effect is a "shield of immunity" for counsel, e.g., insured may have paid \$10k deductible whereas insurer pays \$1m on claim, but insurer has no standing*

**TERMINATING THE RELATIONSHIP****Rule 1.3**

- Attorney must carry representation to the end of a matter unless (1) withdrawal or (2) scope limited under Rule 1.2

**Rule 1.16**

- Withdrawal required in some situations (Rule 1.16(a))
- Permissive in many others (Rule 1.16(b))

**Accepting retainer = implicit agreement "to prosecute the matter to a conclusion"**

- *Kriegsman v. Kriegsman*, N.J. 1977 (105)
  - Cannot withdraw just because:
    - case becomes more complicated
    - work becomes more "arduous"
    - retainer becomes less profitable than expected
  - "[T]he profession is a branch of the administration of justice and not a mere money-getting trade" (106)

**Defaulting on duty can result in contempt of court**

- *Allison v. State*, Miss. 1983 (107)
  - Atty took case through trial, took fee for appeal, perfected appeal, then told client to retain someone else. No agreement reached, so atty did nothing; didn't file in court for withdrawal. → \$100 contempt fine.
    - Even though under the facts, court probably would have allowed atty to withdraw

**Fees on termination by client**

- Three theories, *Rosenberg v. Levin*, Fla. 1982 (111)
  - **(1) Contract rule**
    - damages = full contract price
    - rationale
      - arguably most rational measure of damages
      - prevents client from profiting from his own breach
      - avoids issue of putting value on partially completed legal work
  - **(2) Quantum meruit rule**
    - damages = reasonable value of services at time of discharge
    - rationale
      - client does not breach by discharging attorney
      - allows client greater freedom in choice of counsel
      - promotes public confidence in legal profession
    - NY: atty's CoA accrues on discharge; not outcome-dependent
    - CA: CoA outcome-dependent
  - **(3) Quantum meruit limited by contract price (adopted here)**
    - damages = the lower of value of services rendered or contract price
      - here made contingent on outcome, *cf.* NY rule
    - rationale
      - further freedom of choice for client w/o economic penalty
      - public confidence in the profession

**Resisting termination**

- Courts differ on whether to allow CoA for retaliatory discharge of atty
- Elements required for CoA for retaliatory discharge, *Balla (118)*
  - (1) discharge is in retaliation for employee's activities
  - (2) discharge contravenes a "clearly mandated public policy"
- *Balla v. Gambro, Inc.*, Ill. 1991 (115)
  - In-house counsel Balla advised employer Gambro to reject a shipment of dialyzers because they violated FDA regulations. Gambro persisted; Balla said he'd do whatever necessary; Gambro fired him. Balla informed FDA of shipment, which they did find to violate regulations.
    - Atty could not file suit for retaliatory discharge. (*minority rule*)
    - Refusing suit didn't violate public policy because PP protected by Rule 1.6(b), which requires atty to report information necessary to prevent death or serious harm
  - *Vigorous dissent (121)*—majority's decision "simply ignores reality"; atty threatened with losing his job for doing the "right thing" doesn't have much incentive; worry of stigma on discharged whistle-blower in-house counsel
- *Wieder v. Skala*, N.Y. 1992 (124)
  - Associate atty discharged from firm for insisting that firm comply with rules re: reporting professional misconduct.
    - Gave rise to breach-of-contract action
    - "Insisting that as an associate . . . plaintiff must act unethically . . . amounted to nothing less than a frustration of the only legitimate purpose of the employment relationship." (127)

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**ALLOCATION OF DECISIONMAKING AUTHORITY**

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**RULES 1.2, 1.14****Rule 1.2. Scope of representation**

- (a) Client decides:
  - objectives of representation
  - whether to settle
  - in criminal cases:
    - whether to enter plea
    - whether to waive jury trial
    - whether client will testify
  - Must consult with client about means of achieving
    - Grants implied authority to atty to carry out
- (b) Representation does not constitute endorsement of client's views
- (c) Atty may limit scope of representation if:
  - (1) limitation reasonable under the circumstances
  - (2) client gives informed consent
- (d) A lawyer shall not:
  - counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent
  - but may:
    - discuss legal consequences of a course of conduct
    - assist a client in determining validity, scope, meaning, or application of the law

**Rule 1.14. Client with diminished capacity**

- (a) Atty should try to maintain a normal relationship with the client
- (b) If atty reasonably believes client:
  - (1) has diminished capacity
  - (2) is at risk of substantial harm
  - (3) cannot act in own interest→ atty may take “reasonably necessary protective action,” e.g.,:
  - consultation with those who can protect the client
  - seeking appointment of guardian ad litem, conservator, guardian
- (c) info re: diminished capacity protected by Rule 1.6
  - when taking protection under (b), can disclose to the extent reasonably necessary

## MODELS OF THE ATTORNEY–CLIENT RELATIONSHIP

### Empowered and educated client

- Client more likely to be in primary control (129)

### Disempowered and intimidated client

- Client more likely to defer to attorney

### Client-centered model

- Emphasizes empowering client, lawyer neutrality (130)
- Client must be fully informed and collaboratively involved
- Responds to criticism of lawyer as too controlling

### Justice-centered model

- Atty should advance broader concerns of justice
- More active role for atty; attys not just “hired guns”
- Responds to concerns about attys representing wealthy, powerful entity clients

## AGENCY LAW

### Binding client through apparent authority

- *Conway v. Brooklyn Union Gas Co.*, N.Y. 2002 (131)
  - **Atty has presumptive authority to settle**
    - challenger has burden of rebutting or showing restrictions on authority
  - **Atty gets apparent authority by announcing settlement agreements in open court when client stays silent**

## DECISION-MAKING IN CRIMINAL CASES

### Attorney has no duty to raise all legal arguments that client suggests

- *Jones v. Barnes*, U.S. 1983 (135)
  - Professional counsel has a superior ability to examine the record, research the law, and decide how best to present the case
  - *Dissent*—*atty is meant to assist the client, not dictate how to present the client’s case*

## THE DISABLED CLIENT

### Whether to make mental-state defense not within client's exclusive control

- *United States v. Kaczynski*, 9th Cir. 2001 (141)
  - Kaczynski argued he was coerced into pleading guilty by counsel's insistence on a mental-state defense; that the choice between (1) representing himself and (2) deferring to counsel was unconstitutional
    - Court held that the choice of whether to present this sort of evidence is not like the decisions exclusively reserved to the client in Rule 1.2
    - Request to self-represent was untimely and in bad faith; had declined before; court said was now just to delay trial
  - *Dissent*—court found bad faith because that was the only way to keep Kaczynski from turning the case into a circus and almost certainly being executed, given that K had been found mentally competent

### Standard of competence

- A person who “has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and has a rational as well as factual understanding of the proceedings against him” is “competent” to stand trial, even if he suffers from mental illness or other significant disability. *Dusky v. United States*, U.S. 1960 (153)
- Self-representation may be denied in the judge's discretion, even if person is “competent” to stand trial, if the person still “suffer[s] from severe mental illness” and is “not competent to conduct trial proceedings” alone. *Indiana v. Edwards*, U.S. 2008

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**THE DUTY TO PROTECT INFORMATION**

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**POLICY****Having clear confidentiality rules makes clients more trusting**

- Clients more likely to tell the full story (155)
- Attorney advice & representation improve
- System functions better

**THE ATTORNEY–CLIENT PRIVILEGE****Privilege narrowly construed**

- Upholding the privilege subverts the quest for truth
- Communications protected by the attorney-client privilege are a small subset of the communications made confidential under Rule 1.6

**Test for whether privilege attaches**

- **(1) A communication**
  - does not protect underlying facts
- **(2) Made between privileged persons**
  - Extends to communications between corporate employees and corporate counsel at the direction of corporate superiors for the purpose of securing legal advice, *Upjohn v. United States*, U.S. 1981 (160, 163), especially when corporate superiors took particular measures to control information and ensure awareness of purpose and confidentiality
  - Multiple parties must have aligned interests for privilege to attach between them, *Lynch v. Hamrick*, Ala. 2007 (167)
- **(3) In confidence**
  - may be waived by voluntary disclosure or consent to disclosure
- **(4) For the purpose of obtaining or providing legal assistance to the client**
  - Disclosures made during social visits not included, *State v. Branham*, Fla. 2007 (156)
    - Must be consultation with atty in his professional capacity (158)

**Exceptions to privilege**

- **Waiver**
  - *Lynch v. Hamrick*, Ala. 2007 (167)
    - Voluntary disclosure, or consent to disclosure, waives the privilege
    - Lynch claimed privilege, but had previously consented to disclosure during earlier testimony at trial
  - No “selective waiver,” *In re Qwest Communications*, 10th Cir. 2006 (176)
    - Cannot waive privilege for disclosure to government agencies while retaining privilege for other purposes
      - Ks purporting to limit waiver not enforceable
      - Selective waiver not necessary to ensure corporate compliance with law enforcement
    - *Majority rule*
  - Selective waiver upheld in *Diversified Indus. v. Meredith*, 8th Cir. 1977 (178)
    - Limited waiver when documents disclosed in a “separate and nonpublic SEC investigation”
- **Testamentary** (172)
  - Implicit waiver of privilege if disclosure would further testamentary intent
- **Crime/fraud** (173)
  - Client who seeks legal advice to further a continuing or future crime waives the privilege, *United States v. Doe*, 3d Cir. 2005 (173)
  - Based on client’s intent and knowledge—not atty’s, *In re: Sealed Case*, D.C. 1998 (175)
  - Only applies to affected or relevant communications, *In re Grand Jury Subpoena*, 5th Cir. 2005 (175)

**THE DUTY OF CONFIDENTIALITY****Rule 1.6. Confidentiality of Information**

- (a) Atty *shall not* reveal information relating to the representation of a client unless:
  - client gives informed consent
  - disclosure impliedly authorized to carry out representation
  - disclosure permitted under (b)
  
- (b) Atty *may* reveal to the extent the atty reasonably believes necessary:
  - (1) to prevent reasonably certain death or substantial bodily harm
  
  - (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 atty's services
  
  - (3) to rectify what could have been prevented in (2)
  
  - (4) to get advice about compliance with the Rules
  
  - (5) to establish:
    - a claim or defense for the atty in a dispute with the client
    - a defense to a criminal charge or a civil claim against the atty based on client conductor to respond to allegations in a proceeding re: the representation
    - *Meyerhofer v. Empire Fire & Marine Ins. Co.*, 2d Cir. 1974 (197)
      - Atty allowed to reveal confidential information after having been named as a defendant who willfully violated securities laws
  
  - (6) to comply with law or court order

**Rule 1.8(b). Using current client's information**

- Atty shall not use information related to representation unless:
  - client gives informed consent
  - disclosure otherwise permitted or required

**Rule 1.9(c). Using former client's information**

- After representation terminated, atty shall not:
  - (1) use information related to representation *to the disadvantage of the former client* unless:
    - Rules permit or require
    - information has become generally known
    - *Cf. 1.8(b)*
  - (2) reveal information except as Rules permit or require
    - *Cf. 1.6(b)*

**Rule 1.18(b). Using prospective client's information**

- Only as permitted under Rule 1.9(c)

**Rule 1.13(c). Disclosing organizational client's information**

- If up-the-ladder reporting within the organization doesn't work, atty can reveal info *regardless of Rule 1.6* to the extent the atty reasonably believes necessary to prevent substantial injury to the organization.
- *Also SEC regulations implementing Sarbanes-Oxley (193)*

**Rule 3.3(c). False evidence**

- Atty shall not knowingly offer evidence that the lawyer knows to be false.
  - If false evidence submitted, atty shall take reasonable remedial measures
  - Atty may refuse to offer evidence, *other than the testimony of a defendant in a criminal matter*, that the lawyer reasonably believes is false.

**Rule 4.1(b). Necessary disclosure**

- Atty shall not knowingly fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

**Physical evidence vs. confidential information; waiver**

- *People v. Meredith*, Cal. 1981 (202)
  - Destroying prosecutor's ability to discover evidence by moving or altering evidence = waives privilege
    - Comm'cn between attorney and client about an object = privileged
    - Attorney observes but not disturbs = okay
  - If client brings object to attorney, must deliver to prosecution without revealing source of delivery
- **Metadata**
  - disclosure breaches duty of confidentiality (208)
  - courts split on what to do if receiving accidentally disclosed metadata

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## THE DUTY OF LOYALTY

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### CONCURRENT CONFLICTS

#### Rule 1.7. Conflict of interest: current clients

- (a) No representing a client if it involves a conflict of interest, except as allowed under (b). A concurrent conflict of interest exists if:
  - (1) the representation of one client will be **directly adverse** to another
  - *or* (2) there is a **significant risk** that the representation of one or more clients will be **materially limited** by:
    - the atty's responsibilities to another client or a former client *or* a personal interest of the atty
      - *Cannot favor one client over another*
    - **cmt. [8]. Material limitation**
      - "The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client."
- (b) May represent in presence of a CoI if:
  - (1) the atty reasonably believes he will be able to provide competent and diligent representation to each affected client
  - (2) the representation is not prohibited by law
  - (3) does not involve a claim by one client against another in the same litigation or other proceeding
  - (4) each affected client gives informed consent, confirmed in writing.
- **Informed consent**
  - **cmt. [18]**. Affected client should be made aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of the client.
  - **cmt. [19]**. Necessary disclosures to obtain informed consent may not always be possible.
  - **cmt. [20]**. Must discuss risks, possible advantages, reasonably available alternatives. Writing meant to underscore seriousness of consenting to a conflict.
  - **cmt. [21]**. Client may revoke consent.
  - **cmt. [22]**. Consent to future conflicts may be void, depending on factors including (1) the general or specific nature of the consent and (2) the sophistication of the client.
  - *See also Rule 1.0(e) & cmts. [6], [7].*

- If conflict arises during course of representation, atty must withdraw unless consent obtained under Rule 1.7(b). *Id.* cmts [4], [5].
  - Often the result of corporate mergers

### Resolving conflicts

- Rule 1.7 cmt. [2]
  - (1) Identify client
  - (2) Determine existence of CoI
  - (3) Determine whether conflict is consentable
  - (4) Consult client and obtain written informed consent
- Conflicts are consentable because:
  - Don't want to imede clients' choice of counsel
  - Lawyers make seek ethics counseling; not treated as evidence of a conflict because would deter getting counseling.

### Screening for conflicts

- Rule 1.7 cmt. [3]
  - “[A] lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved.”
  - “Ignorance caused by a failure to institute such procedures will not excuse a lawyer’s violation of this Rule.”
- Rule 5.1(a) & cmt. [2]
  - Managing lawyers must “make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Rules of Professional Conduct. Such policies and procedures include those designed to detect and resolve conflicts of interest . . . .”

### Case law

- *Iowa SCAD Bd. v. Howe*, Iowa 2005 (215)
  - Atty represented criminal Δ & prosecuting city, and billed both for work on the case. As prosecutor, atty made filings on behalf of Δs he was prosecuting.
  - → license suspended for four months

- *Iowa SCAD Bd. v. Clauss*, Iowa 2006 (219)
  - Atty represented clients with conflicting interests (debtor & creditor). Letter he wrote to clients asked only for them to “waive any conflict” without discussing any specifics. Aggravating factor = atty recovered \$ for debtor in other cases, but lender never saw any of it.
  - **Attorney must “do more than simply warn his clients.”**
    - Must make “full disclosure of the possible consequences of dual representation”
  - → license suspended for six months
- *Unnamed Atty v. Ky. Bar Ass’n*, Ky. 2006 (233)
  - Atty for H & W to investigate death of W’s ex. Atty mentioned possible CoI but not that any info obtained would be freely available to both clients.
    - Atty found info implicating one of them; had to withdraw.
  - Bar ass’n said conflicts explanation inadequate → private reprimand.
- *Iowa SCBPE v. Wagner*, Iowa 1999 (236)
  - Atty with 16 years’ experience represented buyer and seller in same real-estate transaction, but didn’t advise re: possible conflicts or why independent counsel was advisable.
  - → three-month suspension

### Conflicts of interest in criminal cases

- *Cuyler v. Sullivan*, U.S. 1980 (222)
  - 6th Amendment issue
    - A court has no affirmative duty to raise the issue of possible conflicts when an attorney represents multiple clients
    - Defendant making 6th Amdt claim must show **adverse effect** from an **actual conflict** (225)
  - Conflicts issue
    - In trial of  $\Delta_1$ , atty rested case without presenting any evidence, possibly in part because this would have exposed witnesses for  $\Delta_2$  and  $\Delta_3$ .
    - However, resting without presenting = “facially reasonable tactic” and  $\Delta_1$  didn’t want to take the stand.
  - Any multiple representation raises possible conflicts; but duty is on atty to raise if needed. Otherwise, court assumes consent or no conflict. There are countervailing benefits to multiple representation, *but see* Rule 1.7 cmt.[29].

- *State v. Watson*, Iowa 2000 (228)
  - Clients:
    - Watson (Δ)
    - Grunewald (witness against Δ)
      - atty's representation of the two overlapped
  - → concurrent conflict
    - Burdened pretrial investigation for Δ because atty couldn't use any info gained from Grunewald against him. Burdened ability to x-examine because couldn't use certain impeaching info. (Rule 1.9(c))
    - Conflict not cured by another atty in firm conducting Grunewald cross; duty/conflict imputed to other attys in a firm because assumption is that attys in a firm share info. (231)

### CONSECUTIVE CONFLICTS

#### Rule 1.9. Duties to Former Clients

- *No representation of a person:*
  - (a) whose interests are materially adverse to a former client's, unless the former client gives written informed consent
  - (b) when a firm with which the atty was previously associated had represented a client:
    - (1) whose interests are materially adverse to the person
    - *and* (2) about whom the atty had acquired information protected under Rules 1.6 and 1.9(c)
      - *unless* the former client gives written informed consent
    - *bar to "knowingly" representing such a client*
- (c) Regarding information of former clients:
  - (1) no using information of a former client to the former client's disadvantage unless (a) Rules permit or require or (b) the information has become generally known
  - (2) no revealing information relating to the representation unless Rules permit or require
- **All conflicts arising from prior representation are consentable. Need only informed consent from former client—not current.**
  - Why more permissive?
    - Doing otherwise would overburden atty's ability to act as counsel and find new clients
    - Former client's interests already served; directly and currently competing interests not at stake.

**Case law**

- *Brennan's Inc. v. Brennan's Restaurants*, 5th Cir. 1979 (261)
  - Atty<sub>1</sub> = represents  $\pi$  now; previously represented  $\Delta$  jointly with  $\pi$ .
    - Disqualified because of issue with preserving confidences under Rule 1.6 (even though atty–client privilege not implicated here).
    - “A client would feel wronged if an opponent prevailed against him with the aid of an attorney who formerly represented the client in the same matter.” (263)
  - Atty<sub>2</sub> = Atty<sub>1</sub>'s cocounsel; no previous atty–client relationship with  $\pi$ .
    - No disqualification by imputation unless, on remand, can be shown that Atty<sub>2</sub> learned from Atty<sub>1</sub> information that  $\pi$  did not want disclosed to  $\Delta$ s.
  
- **“Hot-potato client”**
  - *Santacroce v. Neff*, D.N.J. 2001 (265)
    - Peeps involved
      - Goldberg = longtime client of atty.
      - Santacroce = became Goldberg paramour. Became client of atty at Goldberg's behest. Goldberg paying bills.
    - Goldberg dies; atty continues to represent Santacroce.
      - Goldberg estate wants atty to represent estate.
      - Santacroce prepares to sue Goldberg estate.
    - Atty “fired” Santacroce as client to represent estate.
      - Can't do this: was “a transparent attempt to represent the extraordinarily more remunerative client” (268)
    - → atty barred from representing estate
  
- **Ongoing attorney–client relationships**
  - *Oxford Systems, Inc. v. CellPro, Inc.*, Wash. 1999 (270)
    - **Existence of an atty–client relationship “turns largely on the client's subjective understanding of whether such a relationship exists, provided that subjective belief is reasonable under all the circumstances.”** (273)
      - Here, Becton's had a reasonable belief of an ongoing atty–client relationship with Perkins Coie because:
        - thirteen-year relationship with Perkins
        - Becton's exclusive use of Perkins as local counsel for matters in Washington
        - Perkins had been working on a case for Becton within the last year
      - → Perkins disqualified from representing Lyon & Lyon, defendant in suit by Becton

**PROSPECTIVE CLIENTS****Rule 1.18. Duties to prospective client**

- (a) Prospective client = a person who discusses with an atty the possibility of forming an atty–client relationship
- (b) No use or revealing of information except as permitted under Rule 1.9.
- (c) If prospective client gives atty information that could be “significantly harmful” to a current client in the same or substantially related matter, no further representation of the current client except under (d).
  - Disqualifications under (c) imputed to atty’s firm except as provided in (d).
- (d) Representation OK if:
  - (1) affected and prospective client give written informed consent
  - (2) atty who rec’d info took “reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client”, and
    - (i) disqualified atty is timely screened & gets no fees
    - (ii) written notice is promptly given to the prospective client

**IMPUTED DISQUALIFICATION****Rule 1.10. Imputation of conflicts of interest: general rule**

- (a) No atty in a firm may represent a client that any firm atty could not represent under Rules 1.7 or 1.9
  - *unless* the prohibition is based on a personal interest of the prohibited atty *and* no “significant risk of materially limiting the representation”
- (b) When atty leaves firm:
  - Firm may represent a person with interests materially adverse to those of a client represented by the formerly associated atty and not currently represented by the firm, unless:
    - (1) matter is same or substantially related to that in which the formerly associated atty represented the client
    - *and* (2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter
- (c) Disqualification may be waived by client as under Rule 1.7
- (d) For former/current gov’t attys → Rule 1.11

**Case law**

- *Roberts & Schaefer Co. v. San-Con, Inc.*, S.D. W. Va. 1995 (280)
  - Watson (of Steptoe firm) evaluates matter for San-Con.
    - (concurrent but undiscovered CoI with Roberts)
  - Roberts asks Steptoe to represent in same matter.
    - → Watson & Steptoe withdrew from both.
  - Roberts hires Ruley firm.
    - Ruley & Steptoe merge → Rule 1.10 issue.
  - Steptoe (having subsumed Ruley):
    - Seeks waiver from San-Con (denied).
    - Files motion to determine that Ruley was not DQ'd:
      - “Chinese Wall” (*screening*)
        - Watson not to discuss with Ruley
        - Watson to put files in safety deposit box
        - Delete files from firm computers
  - Court not impressed; Rule 1.10 → DQ (284)
    - San-Con was former client
    - Steptoe had confidential information
    - Representation is same/substantially related matter
    - Former client’s interests are materially adverse
  - . . . without these factors, no DQ

**Imputation in Utah & Nebraska**

- **Utah:** DQ avoidable if the DQ’d lawyer is timely screened & gets no part of fee (cf. Rule 1.18) (288)
- **Nebraska:** former client must consent after consultation (no writing reqmt)

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## FEES AND FIDUCIARY DUTIES

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### FEES

#### Rule 1.5. Fees

- (a) Fees must be reasonable. Factors:
  - (1) time & labor, novelty & difficulty of Qs, required skill
  - (2) likelihood that a matter will preclude other employment by atty
  - (3) fees customarily charged in the locality for such services
  - (4) amount involved and results obtained
  - (5) time limitations imposed by client or circumstances
  - (6) nature & length of professional relationship with client
  - (7) experience, reputation, & ability of attys
  - (8) whether fee is fixed or contingent
  
- (b) Scope of representation & fee to be communicated to client “within a reasonable time after commencing the representation”
  - preferably in writing
  - changes must be communicated to client
  - exception: for regularly represented client & same basis/rate
  
- (c) **Contingent fees**
  - may be prohibited for certain matters
  - must be in writing
    - method of payment
    - percentages
      - in event of settlement, trial, or appeal
    - deductible expenses
      - whether deducted before or after contingent fee calculated
    - specify costs for which client is responsible
  - when matter concludes:
    - must communicate the outcome to client in writing
    - if recovery, state remittance to client & method of determination
  
- (d) No arrangements, charges, or collections for:
  - Any fees in a domestic-relations matter, when payment is contingent upon:
    - securing a divorce
    - the amount of alimony or support
      - *but can collect fee if amt of alimony is already settled*
    - property settlement
  - Contingent fees for representing a criminal defendant

- (e) **Division of fees**
  - May be made between lawyers not in the same firm only if:
    - (1) division is in proportion to services performed *or* each lawyer assumes joint responsibility for representation
    - (2) client agrees in writing to the arrangement
    - (3) total fee is reasonable

### Methods of payment or charging fees

- *Note distinction between fees and expenses*
- *Writing is preferable for hourly; mandatory for contingent*
  
- (1) hourly fees
  - can't double bill in most jurisdictions
- (2) flat fees
- (3) proportionate fees
- (4) contingent fees
  - 1/3 often considered reasonable
  - gross vs. net
  - often include a provision stating what happens if representation terminates
- (5) no fees
- (6) statutory fees
- (7) etc

### Contingency fees

- Serve the system by allowing people to bring claims when a lack of resources would otherwise be prohibitive
- Still justified when time input is low relative to value of settlement
  - at time of representation, atty's risk is high (no guarantee of any recovery) *and* actual course of litigation is unknown
  
- Disallowed when there's really no contingency & thus no risk
  - E.g., seeking payment on a life-insurance policy when company's obligation to pay is clear (298)
  
- *Hauptman v. Turco, Neb. 2007 (301)*
  - Atty to represent client for 1/3 contingency fee. Settlement offer came much earlier than expected. Client discharged atty because he felt that atty was getting too much \$ (value of settlement offer = \$200k).
    - Remanded for further development of record (Hauptman attys hadn't bothered to provide evidence of the value of their services).

- *Brobeck v. Telex Corp.*, 9th Cir. 1979 (306)
  - \$1m contingency fee deemed reasonable
    - emphasis on *value*, not hours per se
- Factors (311, 312)
  - agreement unambiguous on its face
  - Lasky had proffered his interpretation; silence from Telex = acquiescence
  - Telex had a huge \$ judgment reversed
    - sought “the most experienced and capable lawyer it could possibly find”
    - settled on Lasky as most able
    - Lasky wanted to bill hourly
      - Telex insisted on contingent
      - Lasky agreed only if he would get a “sizable contingent fee in the event of success”
  - Lasky wasn’t taking advantage of Telex
    - Telex was huge corp represented by “able counsel”
  - Fee high, but Lasky’s pet’n got counterclaim discharged → saved Telex from threat of bankruptcy

### Impermissible fees

- *Cluck v. Comm’n for Lawyer Discipline*, Tex. 2007 (313)
  - **True retainer**
    - not payment for services
    - advance fee to *secure* services
    - compensation for loss of opportunity to take other clients
  - **“Special retainer”**
    - = advance fees
    - to be drawn from as fees earned, expenses incurred
    - most common (316)
- Here, atty took “retainer” from client; agreement stated hourly fees would be billed against it; when client discharged atty, atty refused to return balance (313)
  - → atty committed professional misconduct because:
    - he took another “retainer” after already being retained & before first had been exhausted
    - he deposited fees directly into his operating account
- “A fee is not earned simply because it is designated as nonrefundable”

**FIDUCIARY DUTIES: HANDLING CLIENTS' FUNDS****Rule 1.15. Safekeeping property**

- (a) Clients' & third persons' property must be kept separately
  - separate account
  - earmarked
  - complete records must be kept and retained for five years
- (b) Atty may put own funds in client trust account solely to pay bank svc charges
- (c) Fees paid in advance → client trust account
  - to be withdrawn only as fees earned or expenses incurred
- (d) Atty receives funds for client or third party → promptly notify
  - promptly deliver if client/third party entitled
  - promptly render full account, if requested
- (e) If atty holds property that becomes the subject of a dispute, property must be held separate by atty until dispute resolved
  - promptly distribute portions about which there is no dispute

**Trust accounts**

- Two kinds
  - (1) Pooled account
    - Includes IOLTA accounts (320–21)
      - nominal interest, short term, etc.
      - interest goes to pay for legal services for the needy
    - *Brown v. Legal Found. of Wash.*, U.S. 2003 (322)
      - Takings claim re: interest earned on IOLTA accts
      - No taking: client couldn't claim/use the interest, so no loss → no compensation required; benefit to 3p ≠ loss to client
  - Subaccounting becoming increasingly feasible
- (2) Separate accounts

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## DUTY TO THE COURT

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### CLIENT PERJURY

#### Rule 3.1. Meritorious claims and contentions

- Comparable to FRCP Rule 11

#### Rule 3.2. Expediting litigation

- “Reasonable efforts to expedite litigation” required

#### Rule 3.3. Candor toward the tribunal

- (a) A lawyer shall not knowingly:
  - (1) make a false statement of law or fact to a tribunal  
*or* fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer
  - (2) fail to disclose known adverse precedent not disclosed by opposition
  - (3) offer evidence that the lawyer knows to be false
    - if false evidence offered & knowledge later, must take “reasonable remedial measures”
    - may refuse to offer evidence the lawyer reasonably believes to be false
      - unless criminal defendant—can only refuse  $\Delta$ 's testimony if lawyer knows it to be false
        - *some jx allow “narrative” testimony from  $\Delta$  in this situation, but this is the minority rule*
- (b) Person engages/intends to engage in fraudulent or criminal conduct in proceeding in which atty has client → must take reasonable remedial measures, incl. possibly disclosure
- (c) Duties continue to the conclusion of the proceeding; apply even if compliance requires disclosure of info protected by Rule 1.6
  - cmt. [13]: Duties extend until appeals exhausted or time for appeal runs
- (d) [stuff about ex parte proceedings]

**Deciding to offer testimony**

- **When refusal justified**
  - *Nix v. Whiteside*, U.S. 1986 (333)
    - Until shortly before trial,  $\Delta$  stated that he hadn't actually seen a gun
      - then: "If I don't say I saw a gun, I'm dead."—changed story
      - indicated  $\Delta$  was fabricating testimony
    - Atty said that would be perjury and there was other evidence they could rely on for a defense
      - defendant convicted;  $\Delta$  claimed ineffective assistance; aff'd
  - **Sixth amdt claim requires  $\Delta$  to establish "serious attorney error and prejudice"**—question is whether atty was "reasonably effective" (335)
- **When refusal not justified**
  - *United States v. Midgett*, 4th Cir. 2003 (344)
    - Client insisted on a third-person defense
      - Atty didn't believe client—but had no knowledge of truth/falsity
      - Court gave  $\Delta$  the choice of either acceding to atty's refusal to put  $\Delta$  on the stand or representing himself pro se
    - **Atty's strong belief is not enough—not atty's job to decide whether  $\Delta$  is lying; atty is not judge, jury, or trier of fact.**
      - *Nix characterized as case in which  $\Delta$  admitted he was going to perjure himself* (347 para.2)
- **"Perjury trilemma"** (350)
  - Ethical obligations:
    - (1) To learn everything possible about the case
    - (2) To keep info confidential except to advance client's interests
    - (3) To reveal confidential info to expose known perjured testimony

**FALSIFYING EVIDENCE****Suborning perjury is a bad idea**

- *In re Attorney Discipline Matter*, 8th Cir. 1996 (351)
  - Custody dispute; witness made damaging testimony. During recess, court reporter's recording equipment left on; atty counseled client that if client denied it, "it didn't happen."
    - *Wrongful decision made in the HEAT OF THE MOMENT*
    - *Fix = put in context to minimize impact*
- Baron & Budd memo (352)
  - Memory-refreshing stuff is fine
  - Canned responses to questions = definitely encourages false testimony

**LAWYER HONESTY****Rule 3.4. Fairness to opposing party and counsel**

- A lawyer shall not:
  - (a) obstruct access to evidence, destroy documents, or counsel others to do so
  - (b) falsify evidence, or offer a prohibited inducement to a witness
  - (c) knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists
  - (d) make frivolous discovery requests or fail to comply with reasonable discovery requests
  - (e) in trial, allude to irrelevant matters or matters not supported by admissible evidence, or inject personal opinion
  - (f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:
    - (1) the person is a relative, employee, or other agent of a client
    - *and* (2) the atty reasonably believes that the person's interests will not be adversely affected by refraining from giving such information

**Bar against misleading the court**

- *In re Wilka*, S.D. 2001 (353)
  - Visitation hearing: client's visitation rights challenged on basis of alleged meth use
    - Took drug test; negative for meth; positive for marijuana
    - Atty told technician to screen just for meth; technician said he couldn't; technician just ripped off bottom of report
  - Atty submitted report fragment as evidence
    - Court asked if the report fragment was the whole report
      - Atty: "That's what I was provided by the hospital. . . . That's what I asked them to screen for." (355)
  - Atty was *misleading*
    - "[E]very attorney [must] be fully honest and forthright. . . . There is no allowance for interpretation." (356)
      - *opposing atty would have been better advised to frame complaint on broader grounds than meth*
- → Public censure, criminal contempt charges, \$100 fine for civil contempt & related press coverage

- *In re Sotomayor*, Ill. 1994 (358)
  - Traffic proceeding. Atty put a clerical worker at defense table where  $\Delta$  would usually sit. Clerical guy looked much like  $\Delta$ .
    - Clerical guy not sworn in as witness at beginning of trial
    - When police officer—sole witness—misidentified clerical guy as  $\Delta$ , and court so noted for the record, atty did not correct
      - Then, atty put clerical guy on the stand, where it came out for the first time that clerical guy  $\neq \Delta$
  - → criminal contempt
    - “[C]onduct which is calculated to embarrass, hinder or obstruct a court . . . or derogate from its authority or dignity, thereby bringing the administration of law into disrepute.” (361)
  - → direct criminal contempt; fine of \$100 (361, 363)

### Duty to disclose contrary authority

- *Massey v. Prince George’s County*, D. Md. 1995 (366)
  - Plaintiff sued police for brutality. First round of legal motions— $\pi$  cited only one case (that  $\Delta$  had cited) and attempted to distinguish on the facts.
    - M for SJ granted for  $\Delta$ .
  - Plaintiff filed motion to reconsider & cited (for the first time) binding and relevant precedent
    - not having done so earlier = “made the judge cranky”
  - **Worse:**  $\Delta$  didn’t mention the case in  $Q$ —which was adverse to them—despite the high probability that  $\Delta$ s knew or should have known of the case
    - → may have deliberately concealed
    - →  $\Delta$ s required to show cause why case not mentioned before

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**DUTIES TO THIRD PARTIES**

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*Third persons are those with whom the lawyer has no professional relationship*

**RULES 4.1–4.4****Rule 4.1. Truthfulness in statements to others**

- Attys shall not knowingly:
  - (a) make a false statement of material fact or law to a third person
  - (b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless prohibited by Rule 1.6.
- cmt. [1]: Prohibition on falsehood by omission or commission
- cmt. [2]: Statements of price/value in negotiations excepted
- *In re Gatti*, Or. 2000 (397)
  - Defendant charged with violations of Rules 4.1 & 8.4. Previously,  $\Delta$  had filed a complaint about prosecutorial investigators; a Bar opinion letter stated that their misrepresentation was permissible.  $\Delta$  conducted his own investigation into the underlying conduct (worker's comp fraud).
  - As private atty,  $\Delta$  represented himself as a doctor.  $\Delta$  found in violation and publicly reprimanded.
    - Reliance on Bar opinion letter held unreasonable.
    - Court could not sanction  $\Delta$ 's outright misrepresentation and fraud; declined to create an exception.

**Rule 4.2. Communication with person represented by counsel**

- Prohibition on communication by atty to a person represented by counsel unless
  - the communication is not about the subject of representation
  - the person's lawyer gives permission
  - *or* permission by law or court order
- *Parties can talk directly to each other*

- *In re Dale*, Cal. 2005 (376)
  - Geyer burns building.
    - Criminal charges against Geyer for arson ( $\Delta$  lawyer = Quigley)
    - Negligence suit against landlord ( $\pi$  lawyer = Dale)
  - Geyer gets convicted.
  - Dale needs Geyer's statement about condition of premises at time of fire. Over Quigley's protestations, Dale repeatedly contacted Geyer about (a) becoming Geyer's defense counsel and (b) getting Geyer's statement for the negligence case.
    - Dale eventually got the statement; Quigley was "furious" because the grounds for appeal was coerced confession & Geyer's statement included a confession.
  - Geyer testified at the negligence trial and Dale never talked to him again.
  - Dale gets in trouble for misconduct (but not for breaking communication rule): two-year probation, four-month suspension, retake MPRE (381)
- *Siebert v. Intuit, Inc.*, N.Y. 2007 (383)
  - **Can't directly communicate with those employees that have the authority to bind the organization, are charged with carrying out the advice of the organization's counsel, or have a stake in the representation.**
    - Limit on contact with employees of represented organization

#### **Rule 4.3. Dealing with unrepresented person**

- Atty can't state or imply disinterest
  - must correct any misunderstanding on this
- Can't give legal advice except to secure counsel if 3p has interests adverse to client
- *Barrett v. Virginia State Bar*, Va. 2005 (386)
  - Barrett sent his wife emails during the course of their divorce, and before wife retained counsel, that constituted legal advice
    - Explained legal doctrine (389)
    - Offered judgment on a legal matter
- *Kensington Int'l Ltd. v. Republic of Congo*, S.D.N.Y. 2007 (390)
  - **Can't use an agent to circumvent rules against giving of legal advice to unrepresented third parties**

#### **Rule 4.4. Respect for rights of third persons**

- (a) Don't embarrass, delay, or burden third parties
- (b) Let sender know if received inadvertently sent document

**WHEN NOT REPRESENTING A CLIENT****Rule 8.4. Misconduct**

- It is professional misconduct for a lawyer to:
  - (a) (attempt to) violate the MRPC, knowingly assist or induce another to do so, or do so through the acts of another;
  - (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;
  - (c) engage in conduct involving dishonesty, fraud, or misrepresentation;
  - (d) engage in conduct that is prejudicial to the administration of justice;
  - (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the MRPC or other law; or
  - (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.
- cmt. [2] Atty is professionally responsible for “[o]ffenses involving violence, dishonest, breach of trust, or serious interference with the administration of justice.” “A pattern of repeated offenses” may also lead to a finding of violation of Rule 8.4.
- *Bosse’s Case*, N.H. 2007 (405)
  - Atty, acting as real-estate agent, uploaded a real-estate listing for a client and signed his name to an exclusive listing agreement, knowing he lacked consent to do so. Despite apparent lack of harm to any party, this “single episode of deceit” was enough to merit a two-year suspension.

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## DUTIES TO THE SYSTEM

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### THE DUTY TO REPORT

#### Rule 8.3. Reporting professional misconduct

- (a) Atty who **knows** that another atty has violated MPRC in a way that raises “a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects” must report
- (b) reporting requirement for judicial misconduct
- (c) exception for Rule 1.6 info and information gained “while participating in an approved lawyers assistance program”
- *In re Riehlmann, La. 2005 (412)*
  - Respondent– $\Delta$  told by Deegan (prosecutor) that Deegan had suppressed exculpatory evidence of  $\Delta$ .  $\Delta$  told Deegan to “remedy” but he died instead.  $\Delta$  did nothing else until five years later when  $\Delta$  was set to be executed.
    - **Rule 8.3 requires *prompt* reporting.**
      - *note that Louisiana’s rule is broader than MRPC*
    - **Knowledge standard:**
      - **Such that a reasonable lawyer under the circumstances would form a firm belief that the conduct in question had more likely than not occurred.**
        - *objective standard*

### DUTIES OF SUPERVISORY AND SUBORDINATE LAWYERS

#### Rule 5.1. Responsibilities of partners, managers, and supervisory lawyers

- (a) Attys with managerial authority must “make reasonable efforts” to ensure that the firm “has in effect measures giving reasonable assurance” that all firm attys will comply with MRPC.
- (b) Supervisory attys “shall make reasonable efforts” to ensure that subordinate attys comply with MRPC.
- (c) Atty is responsible for another’s violation of MRPC if:
  - (1) lawyer orders or, with knowledge of the conduct, ratifies it
  - *or* (2) supervising atty knows of the conduct at a time when it could be mitigated but does not take “reasonable remedial action”

- *Atty Grievance Comm'n of Md. v. Kimmel*, Md. 2008 (419)
  - Supervisory issue: some systems in place, but management inattentive. Newbie atty given way too much work; fell behind; defaulted in professional obligations. Supervisors “had no basis to assume” the competence that they did.
    - Baseline sanction = indefinite suspension, but “intense, immediate, and largely effective recovery efforts” → may apply for reinstatement after 90 days

### **Rule 5.2. Responsibilities of a subordinate lawyer**

- (a) MRPC binding even if violative conduct was ordered by another.
- (b) Subordinate may defer to supervising atty’s “reasonable resolution of an arguable question of professional duty.”
- *People v. Casey*, Colo. 1997 (428)
  - Atty represented S.R., who had gotten in trouble using the name of S.J., who was a different person. Atty continued client’s fiction: represented to the court that he represented S.J., not S.R. Atty’s senior partner “advised” atty in the matter, but atty did not get “safe harbor” under 5.2(b) because duty was not “arguable.”
  - Mitigating factors:
    - absence of prior disciplinary record
    - full and free disclosure to investigating Board  
or cooperative attitude
    - inexperience with criminal law
    - expression of remorse
  - → 45-day suspension; retake MPRE; pay costs of proceeding (~\$2k).
- *In re Howes*, N.M. 1997 (431)
  - Rule 5.2 argument
    - Atty stated he was bound to follow directions of his supervisors at the DOJ → 5.2(b). Court didn’t buy it: that DOJ had issued memos saying that the rule was “burdensome and should not apply to its employees” didn’t make the duty arguable.
  - Aggravating factors
    - Atty refused to acknowledge that his conduct was wrongful (436)
    - Atty had “substantial experience” and violations “were due neither to ignorance nor incompetence.”
  - → public censure & pay costs of proceeding (~\$8k).

**Rule 5.3. Responsibilities regarding nonlawyer assistants**

- (a) firmwide: requires “reasonable efforts” to implement measures giving “reasonable assurance” that nonlawyer’s conduct is “compatible with the professional obligations” of the atty
- (b) direct supervisors: “reasonable efforts to ensure that the person’s conduct is compatible”
- (c) responsible for MRPC-violative conduct of a nonlawyer if:
  - (1) lawyer orders or ratifies conduct
  - (2) knew of conduct when mitigation possible but did nothing

**TEMPERING ZEAL****Rule 1.3. Diligence**

- A lawyer shall act with reasonable diligence and promptness in representing a client.
- cmt. [1]. “A lawyer must . . . act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.”
  - “A lawyer is not bound, however, to press for every advantage that might be realized for the client.”

**Rule 3.6. Trial publicity**

- Limit on extrajudicial statements by public communications

**Rule 3.8. Special responsibilities of a prosecutor**

- (a) no prosecuting if prosecutor knows there is no probable cause.
- (b) make reasonable efforts to assure that the accused knows about his right to counsel and how to get a lawyer.
- (c) no seeking “to obtain from an unrepresented accused a waiver of important pretrial rights.”
- (d) disclose all exculpatory evidence to  $\Delta$  and all unprivileged mitigating information.

- (e) not subpoena a lawyer to testify against (ex-)clients unless:
  - (1) information is unprivileged
  - (2) evidence is essential
  - *and* (3) no feasible alternative to obtain the info
- (f) except for statements to inform the public about a prosecution:
  - no “extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused”
  - *and* ensure other members of prosecutorial team don’t say anything that would violate Rule 3.6
- (g) when prosecutor knows of new exculpatory evidence:
  - (1) disclose to court
  - *and* (2) if conviction was obtained in the prosecutor’s jx:
    - (i) disclose evidence to  $\Delta$  promptly unless court authorizes delay
    - *and* (ii) undertake further investigation
- (h) when prosecutor knows of “clear and convincing evidence” of the innocence of a  $\Delta$  in the prosecutor’s jx, must seek to remedy conviction

**Rule 6.1. Voluntary pro bono publico service**

- At least 50 hours per year without fee for the needy

**Rule 8.4. Misconduct**

- See “duties to third parties”

**Case law**

- *N.C. State Bar v. Nifong*, N.C. 2007 (439)
  - special duties of the prosecutor, Rule 3.8
- *In re Curry*, Mass. 2008 (450)
  - maintaining the perception of legitimacy, Rule 8.4

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**DUTIES TO THE GUILD: ADVERTISING AND SOLICITATION**

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**RULES 7.1–7.4****Rule 7.1. Communications concerning a lawyer’s services**

- No false or misleading communications about lawyer or services
  - material misrepresentation of fact or law
  - omits a fact necessary to make the statement as a whole not materially misleading

**Rule 7.2. Advertising**

- (a) Advertising permissible
  - *constitutionally permissible under Bates, U.S. 1977 (472)*
    - “the bar will have a special role to play in assuring that advertising by attorneys flows both freely and cleanly” (479)
  - *no in-person solicitation, see Rule 7.3*
- (b) No giving anything of value for another’s recommendation of services
  - exceptions
    - (1) may pay costs of advertising
    - (2) pay charges of a legal service plan or not-for-profit or qualified lawyer referral service
      - referral service must be “approved by an appropriate regulatory authority”
    - (3) pay for law practice
- (c) Any advertisement must include:
  - Name and office address of at least one lawyer or law firm responsible for its content

**Rule 7.3. Direct contact with prospective clients**

- (a) no in-person or real-time solicitation unless the person contacted is:
  - (1) a lawyer
  - *or* (2) has a family or close personal or prof’l relationship with the lawyer
- (b) even if (a) applies, no direct solicitation if:
  - (1) person said he didn’t want to be solicited by the atty
  - (2) solicitation involves coercion, duress, or harrassment

- (c) any communication to persons known to be in need of legal services for a particular matter must:
  - contain the words “Advertising Material” at top and bottom *unless* the person falls under (a) (1) or (a) (2)
- (d) prepaid or group legal service plans OK for direct contact
- *Ohralik v. Ohio State Bar Ass’n*, U.S. 1978 (488)
  - **State may discipline an atty for soliciting clients in person, for pecuniary gain, under circumstances likely to pose dangers that the State has a right to prevent**
    - in-person solicitation may
      - “exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection” (491)
      - keep prospective client from “engaging in a critical comparison of the ‘availability, nature, and prices’ or legal services”
      - may not actually facilitate “informed and reliable decisionmaking”
    - state interests
      - “maintain[] standards among members of the licensed professions” (492–93)
- *Florida Bar v. Went for It, Inc.*, U.S. 1995 (497)
  - 30-day limit on targeted letters under Rule 7.3(c) constitutionally permissible under 1st and 14th amds

#### **Rule 7.4. Communication of fields of practice and specialization**

- (a) May communicate whether atty does or does not practice in a particular field
- (b) patent attorney may identify self as “Patent Attorney”
- (c) admiralty practice → “Admiralty” or “Proctor in Admiralty” OK
- (d) no implying that atty is a specialist in a field unless:
  - (1) atty certified as specialist by ABA- or state-accredited organization
  - (2) name of certifying organization clearly identified in the commc’n

#### **Iowa rules**

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#### **Commercial speech and constitutional law**

- *Alexander v. Cahill*, N.D.N.Y. 2007 (481)
  - *Central Hudson* analysis (482)