

Orenstein

Professional Responsibility in the Criminal Practice

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Prof's Exam Tips:

- Two hours – will definitely be pressed for time – intentional.
- Exam Format
 - Similar format to last year's exam posted on BB.
 - Some overlap in the facts and characters. Different questions.
 - Two hours. Pace yourself. Read the whole thing. Get sense of what issues come up where. Some overlap of issues, but each question should focus on different issues. Will focus on things we actually covered in class.
 - For each question, will allocate suggested amount of time.
 - 5-10 mins to read entire exam and organize thoughts. Remaining time divided up.
- Fact patterns
 - Pick out issues raised.
 - 6-8 questions total – a few paragraphs or 1-2 pages per questions.
 - Spot issues, show facility for ethical concepts.
 - Confidentiality issue? Candor issue?
 - Point to rule, standards.
 - Talk about options.
- Assume jx that uses Model Rules.
 - But can also apply ABA standards.
 - Show familiarity.

- Cite cases – useful as shorthand to show understanding of particular concept that would otherwise require a paragraph.

I. ATTORNEYS' ROLES, RULES, REGULATIONS

A. RULES

a. Possible Remedies

i. Case-related sanction (e.g., suppression, re-trial)

1. Lawyers will toe the line. Get more caselaw (i.e., more refined rules). And won't over-deter. Also, gives incentive to D to investigate conduct (b/c actually stands to benefit).
2. Critique: Sometimes results in windfall to D. AND: Can only operate as sanction on Ps, not Ds (b/c Ps can't appeal).
3. Goal should be to make-whole the party/client who got hurt by attorney's conduct. E.g., U.S. v. Isgro (district court).
4. Attorney's state of mind and prior conduct irrelevant—looking at effect on D.

ii. Attorney-specific sanction (e.g., discipline)

1. More deterrence – stamps out behavior. Targets atty.
2. Critique: Over-deterrence problem. No more test cases, less refined rules. D has no incentive to uncover.
3. Goal is to make rules that reinforce system.
4. Will take into account attorney's state of mind and prior conduct. If atty didn't mean to, less punishment (less culpable; harder to deter innocent mistake; less likely to be recidivist). E.g., U.S. v. Isgro (OPR Report).

- ##### iii. Note: Usually just one or the other. Probably just a practical reason—if interest is being addressed w/in the case, less interest in pursuing disciplinary action.

b. Possible Rules

i. Categorical rules about offensive conduct per se.

1. E.g., arguably, some of the candor rules.

ii. Categorical rules about conduct that tends to affect the administration of justice.

1. E.g., Palmieri (elicitation of false testimony).

iii. Only sanction if affected the result, i.e., “no harm, no foul.”

1. E.g., Strickland (IAC claim).

c. Sources of Authority

i. Self-Regulation: Rules are made by lawyers!

1. ABA Model Rules

- a. Two sets: 1983 and 2000. Set minimum standards.
- b. Most jxs have rules that are similar to Model Rules.

2. ABA Model Code

- a. First promulgated 1970. Revised until 1981.

- b. Contains: Canons (aspirational principles); Ethical Considerations (ECs) – more specific, but idealistic; Disciplinary Rules (DRs) – set minimum standards.
 - 3. ABA Standards
 - a. Not binding – ABA is just professional organization.
 - b. But looked to by courts.
 - 4. State disciplinary authority (e.g., agency, or bar association)
 - a. Can promulgate binding rules, and sanction lawyers in disciplinary proceedings.
- ii. Courts
 - 1. Courts have inherent authority to regulate attorneys.
 - 2. Can import standards from disciplinary rules into other adjudications. E.g., in 6A IAC claims; conflict determinations; malpractice actions.
 - 3. So judicial caselaw can develop around disciplinary rules, even if no attys being sanctioned by discipline committees.
- d. Most common problem for lawyers in these cases:
 - i. Lesson for lawyer: Don't get bound up in the facts. Don't be the only person who knows facts helpful to *either* side.

B. DEFENSE FUNCTION

- i. Client is the **defendant**. Not abstract rights; or the process itself.
- ii. **Rakoff, "How Can You Defend Those Crooks?" p. 11**
 - Zealous defense promotes adversarial testing → promotes truth and justice. Lawyer should find out everything he can.
 - Why is it just to defend people you know are guilty?
 - Just outcomes
 - Need to know all the facts before know what is just. Unless have someone to defend what A did to B, won't find the 1% of the time when we can agree that the act was justified.
 - Leads to public morals.
 - Just process
 - E.g., is it moral to convict an accused rapist on strength of coerced confession?
 - Having a zealous defender forces these issues to the fore – would never face these issues if the second confession came forward, attorney told client to plead guilty.
 - In order to have effective system, at minimum need:
 - Zealous defenders
 - Objective and neutral judges and jurors.
- iii. **In the Matter of John Palmieri, an Attorney (1916), p. 2 – Defender's Role**

- Basic Facts: D is pimp. Prostitute “Annette” is witness. Falsely testifies just arrived from upstate, learned about in newspaper.
- RULE:
 - Lawyer can’t elicit false testimony, or adopt witness’s lies as own (e.g., in summation). If know false testimony, should correct.
 - NOT a no-harm, no-foul rule. Doesn’t matter to court whether it affected the result.
 - Sanction the attorney himself – results in more deterrence.
- Result: Palmieri got disbarred. Harsh! Not yet a clear rule, and it was his first violation....
- Majority: Argues for “noisy withdrawal” – announce she is lying and walk out.
- Dissent:
 - Different standards in civil and criminal cases.
 - Palmieri wasn’t trying to elicit anything false—was trying to go right up to the line—and sometimes witness dragged him over it. The responsive answers to his questions were truthful, if misleading.
 - Trying to get jury to believe something he doesn’t believe is different from conveying a falsehood.
 - Can’t coach witness to lie, but if she lies of her own accord (esp. as to immaterial fact), no obligation to discredit (that’s what cross-examination is for).
 - Even if he did something wrong, at most just censure him.
- Real problem:
 - Palmieri had special access to facts, b/c no other witness to his conversations with A. So actually frustrating truth-seeking process.
 - Best alternative: Have another witness in the room w/ attorney, e.g., an investigator. Prevents lawyer from being the only other witness to the facts. Then can call as witness to clear up. Or tell prosecutor someone else was in room, let him decide to call the witness.
- Facts:
 - D is pimp. Charged w/ accepting Annette’s prostitution money. Annette testified before grand jury (against D). Prosecutor was keeping her in an apartment in town for trial. Someone came in the night and took her. (D procured A’s absence.) Then Palmieri (defense attorney) appointed to case the day before trial. Learns about A—asks to send for her. Doesn’t know she has already testified for Prosecution. On second day of trial, calls A as witness. A lies about when she arrived from upstate. Palmieri doesn’t correct—and makes reference to it in summation.

C. PROSECUTION FUNCTION

- a. Prosecutor is **personification of sovereign**.
- b. Client is sovereign. Delegates most of its authority, discretion to prosecutor.
 - i. Society reflected through prosecutor's conscience.
- c. Different views:
 - i. ABA Standards – each line prosecutor must do justice
 - ii. DOJ Manual – “justice” determinations beyond pay grade; just follow our policies.
- d. **Bruce Green, “Why Should Prosecutors Seek Justice?” p. 19**
 - i. Prosecutors have a general duty to “seek justice.”
 - 1. D lawyers should zealously defend right up to line.
 - 2. Ps should stay far away from line.
 - ii. Why obligation to “seek justice”? Two main reasons:
 - 1. Prosecutor's great power
 - a. Theory: Prosecutor's exceptional power is the source of his special duty to seek justice. With power comes responsibility.
 - b. Most powerful client: government.
 - c. Extremely vast powers in criminal context.
 - d. Complete delegation from government.
 - e. Counter:
 - i. But this imbalance isn't a bug—it's a feature. Ps are supposed to prosecute criminals. Should do whatever necessary and proper to fulfill this obligation. Power not to be apologized for or voluntarily limited to “equalize.” We set up the system this way. If want to change, want to change the whole system.
 - f. This rationale works as a reprimand for prosecutorial misconduct.
 - i. P's ethical role in preserving the adversarial process.
 - ii. Not a duty to be disinterested, or even responsibility to achieve factually correct results. Requires only that Ps “strive for adversarially valid results, that is, results that are the product of an adversary process that has not broken down.”
 - iii. Undue vs. appropriate advantage of resources: when P exploits or causes break-downs in adversary process.
 - 2. Real reason: Prosecutors are the personification of the sovereign

- a. Want the sovereign to be just—and b/c acts through prosecution, rules must lead to prosecutors acting justly.
 - b. Represents the sovereign. But also sovereign delegates most authority and discretion to P → Ps make decisions ordinarily entrusted to client.
 - c. Flaw: ABA rules can never constrain the sovereign itself, b/c apply only to lawyers – only the people acting as the sovereign.
 - iii. Elements of “doing justice”
 - 1. Enforce criminal law; avoid punishment of innocent, afford lawful fair process.
 - 2. Treat with proportionality and rough equality b/w law-breakers.
 - 3. P must resolve tension among these objectives in individual cases.
- e. **Berger v. U.S. (SCOTUS 1935):**
 - i. U.S. Attorney is representative “not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.”
 - ii. Two-fold aim: guilt should not escape nor innocence suffer.
 - iii. “But while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce wrongful conviction as it is to use every legitimate means to bring about a just one.”
- f. **The Citizens’ Protection (McDade) Act of 1998 (28 U.S.C. § 530B)**
 - i. RULE: State ethics rules apply to federal attorneys.
 - ii. Ended longstanding debate re who constrains federal government.
 - iii. Creates new problem: what counts as ethics rule?
 - 1. DOJ: Only “true” ethics rules – those that operate only on lawyers. If constrains client, not an ethics rule.
 - 2. Government will argue not really an ethics rule, so don’t have to follow.
 - iv. Line-drawing problem:
 - 1. Constraining what a lawyer can do; vs. Constraining what a client can do, when it is an act that can only be effectuated through the lawyer.
 - 2. Note: Grand jury itself has the power to subpoena witnesses, and not constrained by professional ethics rules. In fact, when prosecutor issues subpoena for grand jury, technically only doing it on behalf of grand jury. So grand jury could subpoena the lawyer, so long as not being issued by prosecutor.
- v. **Stern v. U.S. District Court (1st Cir. 2000), p. 114**

1. Local rule: Prosecutor can't subpoena lawyer representing client without prior judicial approval. (e.g., for fee info).
2. P seeks declaratory judgment against rule.
 - a. Claims it foils the secrecy, expediency of grand jury proceedings.
3. Judge misinterprets statute!
 - a. Says Congress can't have meant to let states override federal authority – can't be a rule that would trump what prosecutors are already allowed to do.
 - b. But this actually is exactly what McDade intended. McDade said federal prosecutors must follow state ethics rules.
4. Different from where DOJ has drawn line: which is that McDade only applies to a true ethics rule. Ethics meaning only lawyer behavior. If it constrains the client in some way, goes beyond ethics.

D. COMPETENCE

a. MR 1.1: Competence

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

b. Sixth Amendment

- i. Text:
 1. “In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”
- ii. 6A right attaches at INDICTMENT.
- iii. Two main conceptions of 6A right to counsel:
 1. Berger: “Counsel” → provides wise judgment
 - a. Functional conception of 6A right to counsel – expertise, competency. Can force more clients to accede to “wise” choices by requiring it as price of counsel.
 - b. Jones v. Barnes (1983) (Berger) – lawyer’s job to make strategic choices, e.g., issues for appeal.
 - c. Wheat v. U.S. (1988) (Rehnquist) – huge deference to trial court’s decision to disqualify counsel based on potential conflict; court has independent interest in integrity of result.
 2. Brennan: “Assistance” → extension of client
 - a. 6A right to counsel is about AUTONOMY. Overriding client’s choices exacerbates suspicion, degrades dignity; perversely, will drive some clients to abandon 6A counsel all together.

- b. Jones v. Barnes (1983) (Brennan, dissent) – client should be boss of appeal; autonomy, dignity interest.
 - c. Wheat v. U.S. (1988) (Brennan, dissent) – should be wary of separating client and chosen lawyer on basis of speculative potential conflicts.
 - c. **Strickland v. Washington (1984) – Ineffective Assistance**
 - i. Holding: 6A right to counsel = right to effective counsel
 - ii. RULE: Ineffective counsel (need both to justify reversal) (IAC):
 - 1. **(1) Deficient performance;** +
 - 2. **(2) Prejudice** (case would have come out differently).
 - d. **Deficient Performance**
 - i. Counsel made errors so serious not functioning as 6A “counsel.”
 - ii. Need high bar b/c so subjective and judging from hindsight—must raise real concerns for adversarial process.
 - iii. Judge performance by prevailing norms of profession.
 - 1. If violate ethical rule, w/o good explanation, then good case that denied effective assistance of counsel. E.g., not revealing beneficial plea offer, conflicts of interest.
 - 2. E.g., Wemark v. Iowa – performance was deficient when tactical judgment was based on faulty premise (but no prejudice, so no relief).
 - iv. Jones – defer to counsel to choose the issues to argue on appeal.
 - v. Strickland – defer to counsel for strategic decisions. E.g., whether witness should testify.
 - e. **Prejudice**
 - i. Prejudice = reasonable probability that affected result (i.e., enough to undermine confidence in the result)
 - ii. Instances of **presumed prejudice**:
 - 1. Erroneous deprivation of hired counsel. Gonzalez-Lopez (SCOTUS). (diff b/w appointed and retained).
 - a. But see United States v. Lopez (9th Cir. 1993), p. 372 (D deprived of chosen counsel b/c lawyer withdrew after P’s violation of no-contact rule; b/c replacement atty was able, court found no prejudice, so dismissal of indictment improper).
 - 2. Betrayal of confidences and advocacy of guilt by defense lawyer. E.g., Montana v. Jones (MT 1996), p. 685
 - 3. Prosecutorial interference with free exchange b/w lawyer and client on matters relevant to defense. (Per se 6A violation.) United States v. Eniola.
 - iii. Note: Actual conflicts of interest only require “adverse effect,” not prejudice.

II. **CONFIDENTIALITY**

A. ETHICAL DUTY OF CONFIDENTIALITY AND ITS LIMITS

a. Model Rules

i. MR 1.6:

ABA Model Rule 1.6 Confidentiality Of Information

- (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).
- (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: (note: try not to implicate D, even if disclose)
 - (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 lawyer's services;
 - (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;
 - (4) to secure legal advice about the lawyer's compliance with these Rules;
 - (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
 - (6) to comply with other law or a court order.

ii. DR 4-101:

ABA Model Code DR 4-101 Preservation of Confidences and Secrets of a Client.

- (A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.
- (B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:
 - (1) Reveal a confidence or secret of his client.
 - (2) Use a confidence or secret of his client to the disadvantage of the client.
 - (3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.
- (C) A lawyer may reveal:
 - (1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.
 - (2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.
 - (3) The intention of his client to commit a crime and the information necessary to prevent the crime.

(4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

(D) A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101(C) through an employee.

b. Duty of Confidentiality – the basics

- i. Goal: Trying to promote identity b/w lawyer and client.
- ii. Source: Professional/ethics rule
- iii. Applies to: Lawyers and subordinates.
- iv. Essence: “I can’t tell you this (but judge can make me).”
- v. Scope: Information “relating to the representation of a client” from any source. MR 1.6. (Protection includes underlying facts.)
- vi. Against: All the world. Can’t tell anyone, no matter who they are.
- vii. Duration: Forever. MR 1.6, cmt.
- viii. Exceptions: (disclosure only permissive; not mandatory)
 1. Informed consent (MR 1.6(a))
 2. Implied consent (MR 1.6(a))
 3. Constructive consent (MR 1.6(b)):
 - a. (1) death/bodily harm;
 - b. (2) prevent crime/fraud;
 - c. (3) rectify crime/fraud;
 - d. (4) to seek ethical advice;
 - e. (5) to defend yourself;
 - f. (6) court order.
 4. Note: Also trumped by MR 3.3 (candor rule); and laws of general applicability.
- ix. Can’t just use word “hypothetically” to get around the rule. But remember if it’s an ethics question, confidentiality doesn’t apply.

c. People v. Belge (1975), p. 79 – not revealing dead body

- i. Context: Indictment against attorney for not revealing location of bodies.
- ii. Issue: How bad was it that attorney did *not* disclose locations of dead bodies? I.e., Not just *may* he have disclosed—*must* he have disclosed? ANSWER: NO.
- iii. Facts: D charged w/ murder. Lawyers decide to use insanity defense – want to introduce other murders at trial as evidence of insanity (note: not a lot of jury appeal...). D reveals the murders to his attorneys. Belge goes out w/ friend and finds body. Identifies. Then leaves, doesn’t reveal. Belge indicted for violation of public health law re burial of the dead.
- iv. **Holding: OK to not disclose.**
- v. Nexus of 5A and attorney-client privilege. Atty stands in client’s shoes. Client can’t be compelled to self-incriminate, so atty can’t be compelled in his place. Otherwise 5A right would be completely nugatory.
- vi. Notes:

1. Belge's friend:
 - a. Bringing friend probably breached confidentiality → court doesn't deal with.
 - b. Atty-client privilege would extend to friend. If called friend to testify → D could invoke privilege to prevent friend from talking.
2. Court says obstruction would be harder case (b/c prevented prosecution for murder).
 - a. Prof disagrees. No obstruction. Didn't obstruct.
3. Court says privilege trumps pseudo-criminal trivial statute
 - a. This is stupid. Judges shouldn't get to decide which criminal laws count.

d. **McClure v. Thompson (2003), p. 82 – disclosing dead bodies**

- i. Context: Habeas petition.
- ii. Issue: Did atty breach duty of confidentiality in making anonymous tip, revealing to police location of children's bodies, when there was a small chance might still be alive?
 1. I.e., *may* attorney have disclosed? Answer: YES.
 2. Note: must defer to trial court's findings.
- iii. HOLDING:
 1. No consent (even though drew map).
 2. But "reasonably believed necessary" to prevent criminal act or imminent harm, i.e., to prevent kidnapping from escalating to murder. MR 1.6(b)(1). Therefore, no violation of confidentiality.
 3. Not IAC → denies habeas (but "close case").
- iv. Dissent:
 1. D was deprived of effective assistance – give him habeas – get a new trial w/ evidence suppressed.
 2. But even though atty technically violated rule, we don't really think he did anything wrong—so don't punish him. Like Jack Bauer defense.

e. **U.S. v. Alexander (9th Cir. 2002), p. 94 - threats**

- i. D = psycho disbarred lawyer. D on charges of threats / extortion.
- ii. Former atty testifies against D at GJ/trial that D had made threats.
- iii. D asserts 6th Amt / atty client privilege violation.
- iv. COURT: communications only protected if they were made "in order to obtain legal advice." Threats don't count.

B. ATTORNEY-CLIENT PRIVILEGE

a. **Attorney-Client Privilege – the basics**

- i. Source: Evidence law
- ii. Essence: "You can't make me tell you this."
- iii. Scope: Communications made: (PA v. Mrozek, 1995)

1. From client or potential client;
 2. To lawyer (or subordinate);
 3. To obtain legal assistance;
 4. No strangers present;
 5. Client has asserted privilege and not waived it.
- iv. Effect: Can interpose to defy court order, subpoena. Prevents admission of evidence at trial.
- v. Duration: Forever.
- vi. Exceptions:
1. Client identity
 2. Fee agreement. See Stern v. U.S. District Court.
- vii. Belongs to client – only client can assert and waive.
1. Client’s lawyer can assert and waive on client’s behalf, if in client’s benefit.
 2. But must be his own lawyer! See GJ Subpoenas Dated April 19, 1978.
- viii. Extends to:
1. Attorney and staff; Experts; Co-Ds in joint defense agreements.
 2. Anyone “assisting the lawyer in rendition of legal services.” Martha Stewart Case (SDNY 2003).
- ix. To defeat:
1. Can only overcome with waiver.
 2. Breach of and/or exceptions to confidentiality ≠ waiver of privilege. See Purcell v. DA for the Suffolk District.

b. PA v. Mrozek (1995), p. 29 – scope of privilege

- i. D kills girlfriend, calls atty, says to secretary, “Honey, you don’t understand, I just committed a homicide.”
- ii. Issue: Whether can compel secretary to testify.
- iii. Holding: No. **Scope of privilege extends to secretary.**
- iv. **Requirements:**
 1. **Client or potential client**
 2. **Lawyer or subordinate of lawyer**
 3. **Trying to get legal assistance**
 4. **No one else there**
 5. **Asserted privilege, and haven’t waived it**
- v. Note: Secretary must have committed confidentiality violation, or else P wouldn’t even know about it. But privilege still applies. Breach of confidentiality doesn’t constitute waiver of privilege. Only holder of privilege can waive.

c. Grand Jury Subpoenas Dated April 19, 1978 (p. 32) – who can assert

- i. Facts: Three people (Roe, Jones, Morton) arrested for importing heroin—2 get indicted, 1 gets dismissed. Atty Benson represents both Ds. Both out on bail. 1 of the Ds gets killed. Other D refuses to cooperate. Finally Benson leaves; D admits doesn’t know Benson, wants to cooperate.

- ii. P subpoenas Benson – want info on Morton (bigger fish). (Note: Pre-McDade – could just subpoena atty.)
- iii. Benson asserts privilege. Says, “I don’t even know who hired me.”
- iv. **HOLDING: Privilege belongs to the client—client has to assert it.** It isn’t Benson’s to assert, if she doesn’t even have a client to consult. Atty-client relationship must exist! Plus, can’t assert privilege over discussions w/ Morton – never represented.
- v. Protects relationship b/w client and lawyer—but doesn’t protect relationship between clients.

d. Purcell v. District Attorney for the Suffolk District (p. 40) – crime-fraud

- i. Lawyer providing legal services to poor people getting evicted. Client being evicted is mad, says he’s going to burn down building. Lawyer tells the police. Later, lawyer subpoenaed.
- ii. Issue: Whether atty-client privilege protects lawyer from being compelled to repeat the disclosure.
 - 1. Not whether initial disclosure breached confidentiality.
- iii. **Holding: Privileged. Crime-fraud exception only applies to confidentiality → NOT atty-client privilege.**
- iv. Reasoning: Don’t want to chill communication. Want to encourage clients to be open, and Purcell to be free to tell. But not to be able to compel after the fact.
- v. Good result: Relieve confidentiality to prevent harm. But don’t allow him to go further to testify against him.

e. Wemark v. Iowa (Iowa 1999), p. 59 – duty to produce physical evidence

- i. Wemark stabbed wife. Overwhelming evidence.
- ii. Lawyer thinks best defense is diminished responsibility, e.g., insanity. While preparing that defense, D tells him where the knife is that he used to stab his wife. Atty mistakenly believed had ethical obligation to disclose. Atty gives bad advice: tells D to reveal to the state doctor.
- iii. **RULE: If lawyer physically had evidence, must hand it over** (but can try to do so w/o implicating client) (can’t obstruct law enforcement investigation). **But if only have info about evidence, no legal obligation to disclose.**
- iv. **HOLDING:** Unreasonable performance by lawyer.
 - v. Tactical judgment based on faulty premise is deficient performance, not mere tactical choice.
 - vi. **BUT:** No prejudice → no IAC. No relief.

f. ABA Standard 4-4.6 Physical Evidence

ABA Standard 4-4.6 Physical Evidence

(a) Defense counsel who receives a physical item under circumstances implicating a client in criminal conduct should disclose the location of or should deliver that item to law enforcement authorities only: (1) if required by law or court order, or (2) as provided in paragraph (d).

(b) Unless required to disclose, defense counsel should return the item to the source from whom defense counsel received it, except as provided in paragraph (c) and (d). In returning the item to the source, defense counsel should advise the source of the legal consequences pertaining to possession or destruction of the item. Defense counsel should also prepare a written record of these events for his or her file, but should not give the source a copy of such record.

(c) Defense counsel may receive the item for a reasonable period of time during which defense counsel: (1) intends to return it to the owner; (2) reasonably fears that return of the item to the source will result in destruction of the item; (3) reasonably fears that return of the item to the source will result in physical harm to anyone; (4) intends to test, examine, inspect, or use the item in any way as part of defense counsel's representation of the client; or (5) cannot return it to the source. If defense counsel tests or examines the item, he or she should thereafter return it to the source unless there is reason to believe that the evidence might be altered or destroyed or used to harm another or return is otherwise impossible. If defense counsel retains the item, he or she should retain it in his or her law office in a manner that does not impede the lawful ability of law enforcement authorities to obtain the item.

(d) If the item received is contraband, i.e., an item possession of which is in and of itself a crime such as narcotics, defense counsel may suggest that the client destroy it where there is no pending case or investigation relating to this evidence and where such destruction is clearly not in violation of any criminal statute. If such destruction is not permitted by law or if in defense counsel's judgment he or she cannot retain the item, whether or not it is contraband, in a way that does not pose an unreasonable risk of physical harm to anyone, defense counsel should disclose the location of or should deliver the item to law enforcement authorities.

(e) If defense counsel discloses the location of or delivers the item to law enforcement authorities under paragraphs (a) or (d), or to a third party under paragraph (c)(1), he or she should do so in the way best designed to protect the client's interests.

g. In re Grand Jury Subpoenas Dated March 24, 2003 (SDNY 2003), p. 70

- i. Expert Witnesses (Martha Stewart Case).
- ii. **RULE: Privilege extends to experts** (e.g., accountants, PR, etc.).
Anyone “assisting the lawyer in rendition of legal services.”
 1. If client goes to accountant → no privilege. But if lawyer consults accountant to assist w/ representation → privilege.
- iii. Protection is broad—extends beyond post hoc limitation on what is directly “relevant” to the expert’s subject.
- iv. Protect principle of open communication—expert is better at determining what’s relevant.

h. United States v. Almeida (11th Cir. 2003), p. 65 – joint defense agmnt

- i. Facts: Two co-defendants enter into oral joint defense agreement. Only oral—didn’t discuss what would happen if one D flips. Tarzan flips—becomes a government witness.
 1. Note: Lawyer can cross-examine Tarzan (only owes duty of loyalty to Almeida). But can’t rebut w/o being witness himself!
 2. Smarter lawyering: Should have asked Almeida at outset—are you willing to bear this risk? If so, waive right.
- ii. D’s lawyer asks Tarzan what he told him during defense meetings.

- iii. P objects: Claims privileged. (Whose privilege? Tarzan. P can't assert for Tarzan—not his lawyer!)
- iv. **HOLDING: Privilege applies to joint defense agreement. But waive privilege if defect and become cooperating witness** (then every man for himself). D free to use previously privileged communications as basis of cross-examination.
- v. Note: This is also fact work product. But would overcome.
- vi. Note: Tarzan can testify to historical facts. But Almeida could invoke privilege against Tarzan's revealing communications he shared during joint defense agreement.
- vii. Good rule?
 - 1. If privileged, protecting Tarzan's lying. Not good.
 - 2. If not privileged, eliminate advantage of confidentiality in first place, b/c if you enter into agreement then flip, can be cross-examined on everything you revealed. Lesson: don't enter into agreement, or don't talk. Undermines agmnt.
- viii. 11th Cir. doesn't properly consider this hard choice.
- i. **In re Grand Jury Subpoena Dated July 6, 2005 (2007), p. Supp 2.II.H., p. 1**
 - i. Appellant made surreptitious recordings of meetings with broker. Then told prosecution about it, but refused to hand over. Stupid.
 - ii. Note: No atty-client privilege – stranger in room dissolves.
 - iii. This is **fact work product** – prepared in anticipation of litigation.
 - a. Why protect facts? Encourage investigation.
 - 2. Qualified privilege: Can overcome by showing:
 - a. **Substantial need**
 - b. **Unable to obtain any other way**
 - 3. Why make fact work product qualified?
 - a. Don't value work product for its own sake, but rather for its facilitation of adversarial process. Without safety valve to get at crucial facts, will skew the system. And won't deter lawyers from doing their jobs: Atty will investigate the facts anyway.
 - 4. Opinion work product
 - a. Reveal attorney's mental impressions or litigation strategies.
 - b. Also qualified privilege – but “heightened” standard.
 - c. System isn't trying to get lawyer's opinions as its goal.

C. PROSECUTORIAL INTRUSIONS

- a. **United States v. Eniola (DC Cir. 1990), p. 109 – interference w/ atty-client**
 - i. Driving a wedge b/w lawyer and client by forcing lawyer to keep a secret FROM the client (rather than where lawyer has to keep the client's confidences).

- ii. Appeal based on IAC. P prohibited D's lawyer from telling him that witness was informant. Relevant to entrapment defense.
- iii. **RULE: Per se 6A violation to interfere with free exchange b/w lawyer and client on matters relevant to defense.** (No need to show prejudice.)
- iv. Effect of this binary rule:
 1. P forced to either bring the case and disclose, or drop the case. E.g., classified info – might decide can't risk bringing case.
 2. Middle-ground rule could help: trust the defendant's lawyer more than defendant.
 3. But implausible that W can still be informant – secret's out.

b. Stern v. U.S. District Court (1st Cir. 2000), p. 114 – P's subpoenas

- i. Driving wedge b/w counsel and client by forcing lawyer to disclose confidential (but not privileged) information.
- ii. Local Rule requires getting judicial pre-approval before issuing subpoena for grand jury.
- iii. U.S. Attorney seeks declaratory judgment that rule is no good.
 1. Prosecutors claim it foils the secrecy, expediency of grand jury proceedings.
 2. Note: Court considers ripe, b/c injury is the threat itself—Ps won't dare violate; rule is already constraining P.
- iv. McDade Act: federal prosecutors must follow state ethics rules.
- v. **HOLDING: Invalidates local rule.** Judge says Congress can't have meant to let states override federal authority – can't be a rule that would trump what prosecutors are already allowed to do.
 1. Misinterprets the statute! This actually is exactly what McDade intended.
- vi. Creates line-drawing problem:
 1. Technically, GJ has the power to subpoena witnesses, and not constrained by professional ethics rules. So GJ could subpoena the lawyer. Can P tell them that? If P issues subpoena on GJ's behalf, violation?
 2. Constraining what a lawyer can do, vs. constraining what a client can do, when it is an act that can only be effectuated through the lawyer.
- vii. Note: Different from where DOJ has drawn line: which is that McDade only applies to a true ethics rule. Ethics meaning only lawyer behavior. If it constrains the client in some way, goes beyond ethics.

III. SCOPE OF REPRESENTATION; DECISION-MAKING

A. MODEL RULE 1.2, CONSTITUTIONAL REQUIREMENTS, AND POLICY

ABA Model Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer	Notes
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<p>(a) Subject to paragraphs (c) and (d), a lawyer <u>shall abide by a client's decisions concerning the objectives of representation</u> and, as required by Rule 1.4, <u>shall consult with the client as to the means by which they are to be pursued</u>. A lawyer may take such action on behalf of the client as is <u>impliedly authorized</u> to carry out the representation. 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, after consultation with the lawyer, <u>as to a plea to be entered, whether to waive jury trial and whether the client will testify</u>.</p>	<p>Client determines goals. Lawyer determines means. Three carve-outs for client:</p> <ul style="list-style-type: none"> • (1) Enter plea • (2) Waive jury trial • (3) Testify <p>Note: This is constitutional floor, plus: <u>Anders</u> – client gets to decide whether to raise non-frivolous appeal. Note: Carve-outs tells us when lawyer MUST abide by client. But nothing tells us when MUST NOT abide by client. Just MR 1.1 Competence.</p>
<p>(b) A lawyer's representation of a client, including representation by appointment, <u>does not constitute an endorsement</u> of the client's political, economic, social or moral views or activities.</p>	<p>To avoid giving lawyers an “out.” (But can still decline based on conflict.)</p>
<p>(c) A lawyer <u>may limit the scope</u> of the representation if the limitation is <u>reasonable</u> under the circumstances and the client gives <u>informed consent</u>.</p>	<p>Lawyer can define scope, so long as reasonable and based on informed consent. But careful: once appear, may not be able to withdraw. <u>See NY State Bar Ass’n Committee Ruling</u>.</p>
<p>(d) A lawyer <u>shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent</u>, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.</p>	<p>Allows lawyers to disentangle themselves if client wants to do something bad. Also blocks 6A IAC claims we don’t like. But doesn’t prevent lawyer from advising on criminality!</p>

a. MR 1.2 Scope Of Representation And Allocation Of Authority

- i. General rule that client is boss.
- ii. Objectives – determined by client (1.2(a)). (Must “abide.”)
 1. Analogy to express consent – client says do it.
- iii. Means – can be determined by lawyer (1.2(a)). (Must “consult.”)
 1. Analogy to implied consent – do things inherent in achieving client’s goal. Must “consult” w/ client re means, but don’t have to “abide” by client’s decisions regarding the means.
- iv. Out of bounds – crime or fraud (1.2(d))
 1. Analogy to constructive consent – price of having lawyer is giving up right to choose these goals.
- v. Carve-outs – Three explicit issues that must be decided by client (1.2(a)):
 1. Plea to be entered.
 2. Whether to waive jury trial.
 3. Whether client will testify.

b. Constitutional constraints

- i. Wainright v. Sykes - exact overlap b/w 1.2(a) carve-outs and Constitutional floor.
 1. Good. Need carve-outs for constitutional requirements → otherwise, too many reversals on IAC claims where lawyer override client. But beyond that, want counsel's expertise.
- ii. Anders – whether to pursue non-frivolous appeal → client.
- iii. Jones v. Barnes – which issues to raise on appeal → lawyer.
- iv. Faretta – right to self-representation → client autonomy.

c. Trade-off: Pro Se vs. Competence

- i. For every rule, always ask:
 1. Who will it drive off path of having counsel altogether?
 2. Is that a bad thing?
- ii. The more decision-making authority to client:
 1. More “unwise” choices will be made.
 2. But also save clients from going it alone entirely. Also, client might have values other than acquittal or reduced sentence.
 3. Brennan's conception: 6A is about autonomy, dignity.
 4. IAC claim: My lawyer was ineffective for not talking me out of the crazy strategy I wanted to pursue → more factual work.
 5. E.g., U.S. v. Masat – Lawyer acceded to D's crazy strategy → not IAC.
- iii. The less decision-making authority to client:
 1. More “wise” choices. Threat of losing lawyer entirely will persuade client to abandon crazy theory.
 2. But more clients will forego counsel entirely (perverse effect). And will foment distrust, suspicion b/w lawyer and client.
 3. Burger's conception: 6A is about fair trials, reliability.
 4. IAC claim: My lawyer's advice was bad → easier to determine post hoc. Only have to evaluate wisdom of lawyer's conduct.
 5. E.g., Jones v. Barnes – Lawyer did not raise D's issue on appeal → not IAC. CT v. Davis – did not call D's witness → not IAC.

B. CASES

a. **NY State Bar Ass'n Committee Ruling (p. 167) – limiting representation**

- i. Issue: Whether lawyer can limit representation to pre-indictment work.
- ii. **RULE: Can limit the scope of representation so long as reasonable and based on informed consent.**
 1. Must inform: Will have to hire another lawyer who will have to re-do much of the work (inefficient); may need prompt representation at arraignment where this lawyer won't appear; other facts.
- iii. But be careful: may not be able to withdraw, once already appear.

b. **People v. Adams (1991), p. 170 – plea deals (“strong” advice)**

- i. D charged with 1st degree murder. Lawyers arranged a plea deal for 4 years in community corrections facility or probation. Great deal! D agrees to plea; but only after lawyers tell him he will be raped and die in prison, using “strong and profane language.” D wants to withdraw plea when realizes going to community corrections, not probation. Appeals trial court’s acceptance of plea; claims coerced.
 - ii. **Majority: Advice was GOOD, even though language inappropriate. No harm no foul.** Affirms denial of motion to withdraw plea.
 - iii. Dissent: This is coerced.
 - 1. If threat is false → coercion.
 - 2. If threat is true → still problematic. If threat of unconstitutional treatment persuades plea, then effectively involuntary.
 - 3. Absent detrimental reliance by P, Ds should be freely permitted to withdraw plea prior to sentencing.
 - iv. In Con Law, Supreme Court has approved trading off plea (w/ lesser punishment) with trial (w/ greater punishment).
 - 1. OK for P to bring external pressures to bear on plea deal – e.g., “global plea offer” – little guy knows that if he holds up deal for mob boss, he’s dead.
- c. **Jones v. Barnes (U.S. 1983), p. 182 – lawyer chooses appeal issues**
- i. Defense lawyer refused to raise issue on appeal; but allowed D to brief them pro se. Lawyer only argued his own points. Habeas action
 - ii. Issue: Whether 6A requires lawyer to raise every non-frivolous issue requested by D on appeal.
 - iii. Trial court affirmed lawyer’s action—consistent w/ professional obligation.
 - iv. 2nd Cir: Reversed. Reasoned from *Anders* – counsel can’t abandon a non-frivolous appeal; therefore, counsel can’t abandon non-frivolous issue w/in that appeal.
 - 1. Note: This case is decided before Strickland. After Strickland, must prove prejudice. Must show the issue he wanted him to raise would have won.
 - v. SCOTUS (Burger): Lawyer’s job is strategic choices, re e.g., what issues to raise. Good appellate advocacy demands selectivity among arguments.
 - vi. **RULE: Defer to counsel to choose the issues to argue on appeal.**
 - vii. Dissent (Brennan): 6A right to counsel is about AUTONOMY.
 - 1. Disagrees that lawyer always knows best. Disregarding client’s wishes will exacerbate suspicion, makes lawyer further indignity.
 - 2. Majority view vitiates 6A in very perverse way: someone that doesn’t want his choice to be overridden will give up his right entirely.
 - viii. Burger vs. Brennan:
 - 1. Question is whether to focus on the “assistance” part of 6A, or the “counsel” part?

- a. Assistance (Brennan) – do what you would do, if you could. Role of counsel is to provide expertise to help you do what you want.
 - b. Counsel (Burger) – he knows what’s best. Role of counsel is to provide judgment.
 - 2. Both majority and dissent rule will result in a lot of ineffective assistance claims. Just different types.
 - a. Brennan rule: My lawyer was ineffective for not talking me out of the crazy strategy that I wanted to pursue → will result in more factual work.
 - b. Burger rule: Was the lawyer’s advice good? → easier to determine post hoc.
 - c. Burger’s rule is more administrable. But doesn’t mean it’s what the 6A requires.
- d. **Connecticut v. Davis (CT 1986), p. 189 – lawyer makes tactical decisions**
 - i. Counsel refuses to call witness that D wants → not ineffective.
 - ii. Consistent with rule: Overall goals are for client, means are for the lawyer.
 - iii. More specific issue: Can appointed counsel in a criminal case decline to call a witness D urges be called just as a tactical matter, w/o allegation that witness would be perjurious or irrelevant?
- e. **United States v. Masat (5th Cir. 1990), p. 192 – not IAC to do client’s bidding**
 - i. This is the downside of Brennan’s autonomy for client.
 - ii. D is a tax protestor. D requires lawyer to argue ridiculous theories that will result in conviction. Judge asks if he wants lawyer to keep doing it, b/c will make him lose. D says yes. Then convicted, now trying to raise IAC claim.
 - iii. **HOLDING: Consistent with 6A to do D’s bidding. Not IAC.**
 - iv. But was it ethical? Arguably not.
 - 1. ABA Model Rule 1.1 – provide competent counsel.
 - v. Ethical layer: Lawyer in charge of strategy, once client determines goal.
 - 1. Ethical layer on top of constitutional floor helps lawyer push back against client’s crazy wishes.
 - 2. Need strong ethical structure to direct lawyers to use best ethical judgment. Lawyer is in charge of strategy and tactics, once client determines the goal.
 - 3. Helps lawyer say something other than, “To avoid getting in trouble, I will accede to your crazy wishes.”
 - vi. Is there a trade-off here b/w the rule and client going it pro se?
 - 1. Ethical rule could drive some people in the world like Masat into the world of pro se. Not ideal. But if that’s the person that’s going off pro se, maybe that’s an acceptable cost, given that same system will persuade others to abandon their crazy theory, so they don’t lose their counsel.

2. It is not always a bad thing to have the pro se trade-off. If it makes it easier for lawyer to talk client into something better for them, maybe that's a good rule.
 3. Always ask who the rule will drive off the path of having counsel, and see if that's a bad thing.
- f. **Foster v. Strickland (11th Cir. 1983) – lots of deference if follow D's will**
- i. Again, if D tells counsel to mount the defense one way and counsel does it and it doesn't work, very heavy burden on D so show ineffective counsel.
 - ii. "Petitioner, who preempted his attorney's strategy choice, cannot now claim as erroneous the very defense he demanded Mayo present."

IV. SUPERVISORY DUTIES

A. MODEL RULE 5.1

a. MR 5.1 Responsibilities of Supervisory Lawyers

ABA Model Rule 5.1 Responsibilities Of Partners, Managers, And Supervisory Lawyers

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

- (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
- (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

B. CASES

a. In the Matter of Donald V. Myers, Respondent (2003) – DA's duties

- i. County Sheriff's Dept. taped a convo btwn murder suspect and his lawyer. When ADA got there, he told them to turn of the recorder, but didn't inform anyone else of the tape's existence. A week later, ADA told his boss, the DA. The detective's report that came out later didn't mention it. D didn't find out until over two years later - murder conviction and death penalty rev'd later because of prosecutorial misconduct. Should have told D!
- ii. **HELD - DA violated RPC 5.1** (direct supervisor shall make sure that subordinate lawyer conforms to the rules of prof. conduct).
 1. DA was "Direct Supervisor."

2. ADA violated Prof. Conduct rules
3. DA didn't "make reasonable efforts" to ensure ADA followed rules.
 - a. "Reasonable" is dependent on situation - here he had good reason to think that he'd have to follow up and check to make sure ADA informed Defense!
- iii. This is disciplinary mechanism through Bar Association.
 1. If only disciplinary → no advantage to client.
 2. If only case-related → hurts client (i.e., gov't) on misconduct side.
 3. Disciplinary sanction may over-deter – lawyer will always have to do line-drawing – here, will stay far away.
 4. Stay far away b/c 6A right really important? But this goes more to where the line is drawn, not how far you push people from it.

b. U.S. v. Smallwood (2005) – investigators held to same standards

- iv. Context: Not a disciplinary charge. Appointed counsel wants to get paid; judge has to sign off.
- v. Defense Counsel's investigators caught taping prosecution witnesses w/o their knowledge. Investigators find out about informant in jail; investigators end up talking to him as a ruse without informant's lawyer present.
- vi. Issue: Must an investigator hired by a lawyer abide by lawyer's ethical obligations not to
 1. communicate with person known to be represented by counsel regarding the subject of the representation, or
 2. record a convo w/o knowledge and consent of the person?
- vii. **HOLDING: YES. Can't do through an agent what you can't do by yourself.** Investigator's contact was improper. Lawyer must make reasonable efforts to make sure non-lawyer's conduct complies lawyer's PR rules.
- viii. NOTE: If lawyer isn't supervising at all, ethical rule isn't implicated.
 1. Worry: Either lawyer oversees agents (constrains tactics) or agents work w/o any legal guidance at all.
- ix. In this case, lawyers didn't know what was going on, and arguably they shouldn't reasonably have known so, no disciplinary action or anything.

V. CLIENT AND WITNESS PERJURY

A. MODEL RULES 1.2, 1.6, 3.3, 4.1, 1.16

- a. **MR 1.2(d) (Scope) → lawyers cannot engage in unlawful conduct.**
 - i. "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law."

- b. **MR 1.6(b)(2)-(3) (Confidentiality) → lawyer *may* breach confidentiality to prevent client from using lawyer to commit crime/fraud;** or to rectify client’s use of lawyer to commit crime/fraud (but not an affirmative obligation to reveal).
 - i. “A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: (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) 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”
- c. **MR 3.3 (Candor) → duty to disclose false testimony.**
 - i. “(a)(3) . . . 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 may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.
 - ii. (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.”
 - iii. Note: Inconsistent w/ “narrative approach.” See People v. Johnson.
- d. **MR 4.1 (Truthfulness to Third Parties) → confidentiality trumps**
 - i. Rule 4.1 Truthfulness In Statements To Others. In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) 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.
- e. **MR 1.16 (Terminating Representation)**

ABA Model Rule 1.16 Declining Or Terminating Representation	Notes
(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, <u>shall withdraw</u> from the representation of a client if:	← MUST withdraw:
(1) the representation will result in violation of the rules of professional conduct or other law;	
(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or	
(3) the lawyer is discharged.	
(b) Except as stated in paragraph (c), a lawyer <u>may withdraw</u> from representing a client if:	← MAY withdraw:
(1) withdrawal can be accomplished without material adverse effect on the interests of the client;	If no harm to client, OK.
(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal	Consistent with 1.2(d) (disentangle from

or fraudulent;	crime/fraud)
(3) the client has used the lawyer's services to perpetrate a crime or fraud;	Here, lawyer is potentially witness about what client did, so added interest in adversarial system working
(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;	This is huge. Possibly inconsistent w/ 1.2(b) (representation ≠ endorsing client's views). Remember, can hurt client here.
(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) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or	
(7) other good cause for withdrawal exists.	
(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. <u>When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.</u>	May not be able to withdraw, even if good cause!
(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. CASES

- a. **Nix v. Whiteside (U.S. 1986), p. 217 – non-cooperation w/ perjury**
 - i. Issue (as framed by majority): Whether 6A is violated when attorney refused to cooperate with D in presenting perjured testimony at trial.
 - ii. HELD: No. Lawyer did not breach any professional duties → no IAC.
 1. **No right to commit perjury under 6A - no cognizable claim.**
 - iii. Alternate framing: Whether 6A is violated when D forced to choose b/w having counsel and going pro se based on the content of his testimony.
 - iv. Facts: Self-defense: D thought V was about to pull a gun from the pillow, but didn't see the gun. Right before trial he changes testimony to say he saw "something metallic" and says if he doesn't say so he's "dead." Lawyer warns against perjury; threatens to reveal perjury to court if he says it. D testifies w/o mentioning the "metallic" thing.

- v. MAJORITY (Burger): Paternalistic view of D's rights. Begrudging acknowledgment of D's right to testify. Goal of 6A is reliability. (Same year as Strickland.) Client perjury incompatible with truth-seeking.
 - 1. Critique: No confidence in adversary process! Cross-examination is supposed to reveal truth. Plus, what else is incompatible – 5A privilege? Suppression? Etc.
 - 2. Counter: Lawyers' involvement in perjury makes falsity harder to ferret out.
- vi. **TAKE-AWAY: This is about role of lawyers. Perjury is not legitimate purpose.** Not only will lawyers not help you commit crime; won't help you at all, once you decide to go that route.
- vii. CONCUR (Blackmun): Should not decide question of propriety of lawyer's conduct. B/c no prejudice, under Strickland no need to resolve whether deficient performance.
 - 1. Note: Twists meaning of "prejudice." Means outcome might have been different. Concurrence implies you evaluate the rightness/wrongness of outcome. If want reliable outcome, adding falsity into the mix can't make more reliable.
- viii. CONCUR (Stevens): Hard to know whether client is lying. It's not totally clear that the client is perjuring – risk is that lawyer assumes he is. But proper to dissuade from perjury, including by threatening to reveal.
- ix. Circuit split on whether atty must make some kind of factual showing why the testimony is perjured before asking for withdrawal from the case.

b. People v. Johnson (Cal. App. 1998) – narrative approach to client perjury

- x. Options when client wants to perjure himself:
 - 1. Cooperate fully (even argue to jury) – no court has endorsed.
 - 2. Persuade him not to ← always do first!
 - 3. Withdraw – but doesn't necessarily solve problem; called "ostrich-like approach." (next lawyer will simply face same problem.)
 - 4. Disclosure to court
 - a. Results in mini-trial;
 - b. Breaches confidentiality & raises conflict of interest;
 - c. Always a chance D will change mind and testify truthfully.
 - 5. Narrative approach - allow D to take stand; ID as D, allow to make statement; no direct exam; no argument to jury on basis of it.
 - a. criticized in that it makes atty an accomplice to fraud (Q: is sitting back and taking a "free narrative approach" to client's perjury equal to "engaging in fraud or deceit?")
 - b. criticized in that it broadcasts fact that perjury is happening
 - 6. Refuse to permit to testify – results in complete denial of right to testify; substitutes defense counsel for fact-finder.
- xi. **Court settles on narrative option as best**, even though inconsistent w/ current Model Rules (3.3 – duty to disclose falsity of evidence, even if disclosure compromises client confidences).

- xii. **Holding: Trial court violated D’s constitutional right to testify – have to let D testify. Narrative Approach is the best.**
- xiii. BUT: No relief, b/c harmless error beyond reasonable doubt, b/c evidence against D was so overwhelming.
- c. **People v. Appel (NY App. Div. 1986), p. 244 – no-perjury rule applies at plea**
 - xiv. Wrinkle on issue: what happens when D’s perjury is *inculpatory*?
 - xv. Facts: D swore he was innocent but told atty he wanted to take guilty plea. Atty wouldn't let him do both because that's perjury - attempted to negotiate Alford plea, when that failed told D that if he wanted to plea he'd have to fire him and get another lawyer. D didn't fire him, they went to trial, D convicted. D tries to vacate conviction based on IAC. (Not IAC at trial—only IAC in refusing plea.)
 - xvi. HELD: No IAC, conviction stands. Rule against putting on perjury prevents atty’s conduct from being ineffective assistance.
 - xvii. Question: Should there be a different standard in guilty plea context?

VI. DUTY OF CANDOR

A. MODEL RULE 3.3 AND THEORY

a. Duty of Candor

- i. Purpose: To protect integrity of adjudicative process; respect court.
 - 1. Goal is not truth per se. Rather, protecting adversary system that we trust to promote the truth.
 - 2. Heightened duty of candor in ex parte context, b/c need to ensure reliability in absence of adversarial testing.
 - 3. General intolerance of deception in the cases. Not just driven by adversarial process concerns. Also, respect for court.
- ii. Candor and confidentiality are the two biggest duties on attorneys.
 - 1. Together define fundamental definition of attorney’s role.
 - 2. Sometimes candor and confidentiality are in tension – determine extent to which want to undermine trust relationship to further some other goal of adversarial process.
 - 3. Note: Rule 3.3 (candor toward tribunal) trumps confidentiality!

iii. MR 3.3 – Duty of Candor

ABA Model Rule 3.3 Candor Toward Tribunal	Comment
(a) A lawyer shall not knowingly:	
(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;	
(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	Duty to disclose directly adverse authority

<p>(3) offer evidence that the lawyer <u>knows</u> 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 <u>reasonable remedial measures</u>, 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 <u>reasonably believes</u> is false.</p>	<p>RULE: If <i>know</i> evidence/testimony to be false, atty MUST not offer. If <i>reasonably believe</i> to be false, MAY refuse to offer.</p> <ul style="list-style-type: none"> - Exception: Some jxs require allowing D to testify (use narrative method). - Remedial measure: try to convince client to correct statement; if fail, must disclose as necessary to remedy. - In adversarial setting, no obligation to speak up to correct adversary's error. See <u>TX Opinion</u>.
<p>(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.</p>	
<p>(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply <u>even if compliance requires disclosure of information otherwise protected by Rule 1.6</u>.</p>	<p>Candor trumps confidentiality! Time limit: Duty to correct false evidence ends with final judgment + affirmed or appeal time-barred.</p>
<p>(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.</p>	<p>Heightened duty of candor in ex parte context. See <u>In re Dodge</u> (P must make GF effort to investigate claim at bail hearing); <u>but see Williams</u> (in GJ, P need not present exculpatory evidence).</p>

B. COMMUNICATIONS WITH ONE'S ADVERSARY

a. MR 3.8(d)

<p>ABA Model Rule 3.8 Special Responsibilities Of A Prosecutor The prosecutor in a criminal case shall: . . . (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</p>
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b. ABA Standard 3-3.9(a)

<p>Standard 3-3.9 Discretion in the Charging Decision (a) A prosecutor should not institute, or cause to be instituted, or permit the continued pendency of criminal charges when the prosecutor knows that the charges are not supported by probable cause. A prosecutor should not institute, cause to be instituted, or permit the continued</p>
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pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction.

c. ABA Standard 3-3.11

Standard 3-3.11 Disclosure of Evidence by the Prosecutor

(a) A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused.

(b) A prosecutor should not fail to make a reasonably diligent effort to comply with a legally proper discovery request.

(c) A prosecutor should not intentionally avoid pursuit of evidence because he or she believes it will damage the prosecution's case or aid the accused.

d. ABA Standard 3-4.2

Standard 3-4.2 Fulfillment of Plea Discussions

(a) A prosecutor should not make any promise or commitment assuring a defendant or defense counsel that a court will impose a specific sentence or a suspension of sentence; a prosecutor may properly advise the defense what position will be taken concerning disposition.

(b) A prosecutor should not imply a greater power to influence the disposition of a case than is actually possessed.

(c) A prosecutor should not fail to comply with a plea agreement, unless a defendant fails to comply with a plea agreement or other extenuating circumstances are present.

e. People v. Jones (N.Y., 1978), p. 268 – P silent about dead witness

- i. D entered plea. Didn't know key prosecution witness had died. Now wants to withdraw plea.
- ii. Issue: Obligation for Prosecution to disclose death of key witness before accepting D's plea (i.e., non-evidentiary but material information)?
- iii. Reasoning: It's not technically *Brady* stuff because it's not exculpatory or impeachment evidence. Though relevant to D's plea decision. D can w/draw guilty plea if he was tricked or coerced. Silence only gives rise to misconduct when there's an affirmative duty to speak.
- iv. **Holding: OK for Prosecution to have stay silent here.** No affirmative duty to disclose. It's not about factual guilt-finding so imposing an affirmative duty would serve no purpose. BUT: If had been asked directly, could not lie.
- v. Upshot: Not preserving truth per se. B/c if only want "right" result, not worried about P lying, so long as get the right outcome (i.e., guilty plea). Rather, protecting adversary process that we trust to promote truth.

f. People v. Rice (N.Y., 1987), p. 271 – P misleads about dead witness

- i. Facts: Two complaining witnesses. One dies. P misleads D into thinking the other witness is still alive and is going to testify. ("deliberating dissembling and telling half-truths...") D gets convicted of only one of the

- charges. Wants reversal.
 - ii. Issue: Whether P must be truthful that witness is dead before trial (i.e., non-evidentiary but material information)?
 - iii. **Court says P's conduct was unethical and wrong. But no prejudice. No harm, no foul.** No reversal.
 - iv. Dissent: P's lies led D to adopt a trial strategy that he wouldn't have adopted without the lies. Can't know how it would have come out. Therefore, should have a per se rule where you assume prejudice, have a new trial.
 - v. Critique: Requiring disclosure allows D to adopt strategy designed to evade adversarial testing. Bad. If D wouldn't have otherwise adopted that strategy, then can assume didn't think would succeed in adversarial testing. We aren't interested in protecting positions that wouldn't survive adversarial testing.
 - vi. Want to give people enough info so they can fairly test your evidence; but not so much info so that they can tailor their own evidence falsely against it. Neither party wants to commit himself to his story too early.
- g. Hypo: "Bad" witness – P's witness gets arrested for bad crime. Disclose?**
- i. Brady rule – impeaching info must be disclosed before trial.
 - ii. I.e., if witness has criminal record, must disclose.
 - iii. Why require if "bad" witness, but not if dead witness?
 - iv. Requiring disclosure when someone is "bad" witness → also encourages strategies that are subversive of adversarial process.
- h. In Re Pautler (Colorado, 2002), p. 273 – DA masquerading as PD**
- i. D (Neal) murders 3 women. Tells cops to call him. Cops talk to him for 3 hours—confesses to murders on tape. Then Neal says won't come in unless gets PD.
 - ii. Pautler says doesn't trust PDs—they will tell D to stay silent. Instead, pretends to be the PD.
 - iii. No constitutional 4A, 5A, 6A violation. Just an ethical issue.
 - iv. There's no case-related sanction that would make any difference here, b/c Neal remains screwed.
 - v. Only issue is whether Pautler should keep his DA job.
 - vi. DA claims Imminent Public Harm Exception – but here no imminent harm. No hostages, etc.
 - vii. **HOLDING: Violates ethical rules Rules 4.3 and 8.4(c).**
 - 1. Rule 4.3 - Dealing with Unrepresented Person.
 - 2. Rule 8.4 – Misconduct. "It is professional misconduct for a lawyer to: . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation"
 - viii. Result: Probation.
 - ix. General intolerance for deception – goes beyond adversarial process concerns. Seems more based on respect for court.
 - 1. Note: This is only an ethical rule. If cop had done this, no

discipline. No protection!!

i. Hypo: Pautler Variation - ticking time bomb

- i. What if this were a ticking time bomb case, where someone was about to die, and really no PD available, etc?
- ii. According to the rule, same result—not allowed.
- iii. But Jack Bauer defense – he won't be sanctioned. No one will discipline him. Don't need an explicit exception in the rule to achieve that result.
- iv. Creating an explicit exception might make people like Pautler engage in more deception like this.

C. COMMUNICATIONS WITH COURT

a. Trial Tactics

- i. **MR 3.3 (Candor) → must disclose perjury, correct falsehoods**
- ii. **MR 3.4 (Fairness) → no obstructing, destroying, falsifying relevant evidence; no vouching.**

Rule 3.4 Fairness To Opposing Party And Counsel

A lawyer shall not:

- (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
- (b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
- (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) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;
- (e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused;
- or
- (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 or an employee or other agent of a client; and
 - (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

- iii. **ABA Standard 4-1.1 → standards not criteria for evaluating misconduct; but may be relevant.**

Standard 4-1.1 The Function of the Standards

These standards are intended to be used as a guide to professional conduct and performance. They are not intended to be used as criteria for the judicial evaluation of alleged misconduct of

defense counsel to determine the validity of a conviction. They may or may not be relevant in such judicial evaluation, depending upon all the circumstances.

iv. **United States v. Sabater (2d Cir. 1987), p. 305 – swapping Ds**

1. Lawyer swapped D with sister at break. Sister at defense table, D in back of courtroom. Trying to pull fast one on witness (problem: on judge too).
2. Note: This would have been perfectly legitimate if lawyer had just told the judge. “Look, I don’t think the witness can identify my client.” Witness IDs are often problematic. OK to test accuracy of recollection. But this was TRICK.
3. **Holding: Lawyer violated NY rule to comply w/ customs, practices of tribunal** (not about candor). “Probably” also violated MR 3.3 and 3.4 → not as clear lawyer violated.
4. Upshot: Can pull a fast one on witness, so long as give notice to judge.
5. Interest protected: Adversary system. Lawyer actively tried to trick witness, by putting look-alike where expect D to be. Putting decoy in chair doesn’t actually promote reliability. Want fair shot at fair adversarial testing. Also: Respect for decorum of courtroom.

v. **U.S. v. Lauersen (S.D.N.Y., 2000), p. 314 – proffer agreement**

1. Proffer Agmt gives use immunity; says we won’t use your testimony against you unless you contradict what you said at trial.
2. Paragraph 2(b): Can use statement to cross-examine D if she testifies, or to rebut any evidence or arguments offered by D.
3. D enters proffer agreement, but deal breaks down. No plea.
4. Issue: What type of cross-examination will trigger admissibility of proffer statements.
 - a. Waiver argument: not knowing & voluntary.
 - b. 6A argument: effectively abrogates right to trial.
5. Holding 1: D’s waiver as to “rebuttal” use was not knowing & voluntary here. This holding is limited to her specific facts.
6. Holding 2: **ETHICAL RULE: D’s lawyer may not present evidence or arguments that contradict the proffer statement.**
 - a. Rationale: Integrity of proceedings; ensure matters presented to jury grounded in good faith.
 - b. “This Court will not permit [D’s] counsel to elicit substantive (non-impeachment) testimony, either on cross-examination of witnesses called by Government or from witnesses call to testify on her behalf, or to present arguments to the jury at any stage of the proceeding, including opening statements, that directly contradict specific factual statements made by [D] in the [proffer] statement.”

7. **Upshot: Can't put on a defense!** In proffer, D admitted the crime occurred, that she did it, that she had mens rea. Nothing else left. Only thing left to argue: You will not hear evidence that persuades beyond a reasonable doubt.
8. This is even worse than rule admitting the statement!
 - a. If rule were just evidentiary, i.e., that statement might come in, D could try to walk the line—put on a defense, cross-examine gov't witnesses. Just be careful in cross: If come close to implicating the prior statement, can come in.
 - b. Instead, create ethical rule that hamstring lawyer herself → will keep her farther from line → can't do anything inconsistent w/ statement or could lose her job. This is NOT a recognizable conflict of interest, i.e., ethical duty vs. zealous advocacy.
9. **DO NOT GO TO PROFFER SESSION UNLESS SURE YOU ARE PLEADING GUILTY.** Virtually impossible to go to trial once you sign a proffer agreement.
10. Result of Lauersen is natural result of:
 - a. Jones v. Barnes – majority's view about role of 6A counsel: only about enhancing reliability.
 - b. Nix v. Whiteside – lawyer must wash hands of client who wants to commit perjury.
 - c. Result is ethical obligation not to put on arguments that are inconsistent w/ client's statement.

b. Ex Parte Proceedings

- i. Heightened duty of candor in ex parte context → to promote reliability, in the absence of adversarial process
- ii. MR 3.3(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.”
- iii. **In re Dodge (Idaho 2005), p. 320 – ex parte bail hearing**
 1. P gets arrest warrant on D. Tells judge to set high bail b/c D has pulled shotgun on the deputy before. This had not been established. In prior suit, Dodge had been the Prosecutor—only established that D had the gun, not that she brandished it.
 2. Issue: Should Dodge be sanctioned for the “pulled the gun on the deputy” part?
 3. **RULE: No materially false statements in ex parte setting. And must make GF effort to investigate.**
 4. Materiality: Viewed from perspective of REASONABLE PERSON. Can't depend on subjective view of the decisionmaker receiving the comment. Don't want rule to be based on particular tribunal, b/c can't plan conduct around that.
 5. Majority: Even if she didn't intend to deceive, she had a basis for knowing better and she didn't make a good faith effort to find out.

6. Dissent: This was just negligence—not a knowingly false statement.
7. Majority view accords with interest in adversarial testing:
 - a. If had adversarial testing, the weaknesses of Dodge’s statement will be exposed.
 - b. That won’t happen in Idaho where bail hearing is ex parte. Want reliable result. Therefore, impose duty on Dodge that wouldn’t impose in adversarial setting.
 - c. Here, require GF effort to investigate her claim. Wouldn’t need that in adversarial testing system.
8. Upshot: Where don’t have adversarial testing to ensure reliability, increase obligation of candor on lawyer, to ensure reliability. Tells us duty of candor is really all about promoting adversarial testing as ensuring reliability.

iv. **United States v. Williams (U.S. 1992), p. 325 [Note case] - GJ**

1. **Holding: P does NOT have to present exculpatory evidence to grand jury.**
2. Reasoning: (1) GJ is outside of SCOTUS supervisory role; (2) GJ is an investigative, not adjudicative role.
3. But it’s still an adjudicative role: determining if there’s PC!
4. This case counters Prof’s theory re duty of candor compensating for adversarial process. If think ex parte setting requires heightened duty of candor b/c no adversarial testing, then this case undercuts that theory.
5. Court says as supervisory capacity, none of its business.
6. But note: After McDade, court could probably create ethical rule requiring P to present exculpatory evidence.

c. **Sentencing**

i. **TX Eth. Op. 504 (July 1995), p. 329 – D’s lawyer stays silent**

1. Prosecution has incorrect info that D doesn’t have any prior crimes. Says to D’s lawyer, “He doesn’t have any priors, right?” D’s lawyer stays silent. Gets probation.
2. TX Ct says no ethical violation. No false statement—just silence. Also, confidentiality requires silence (can quibble w/ this).
3. Mirror image of *Jones* (dead witness) → do we want the D’s counsel to speak up? But info on priors is more readily available than death notices.
4. This is the adversarial system at work. We already have a prosecutor. Don’t want D’s counsel to be his assistant. Duty of candor doesn’t protect against deficient performance. Adversarial system is working. Garbage in, garbage out.
5. Note: At another point in case, Court asked D counsel if going to ask for probationary sentence b/c D has no priors. D’s counsel

gives a VERY careful answer (e.g., “if no evidence of priors, then...”). Court doesn’t examine this statement, but Prof thinks more problematic. Analogy to perjury prosecution—lawyer would try to make a literal truth defense.

ii. **OH Adv. Op. 99-8 (Dec. 1999), p. 332**

1. **RULE: Defense attorney has ethical duty to notify court of typo resulting of lesser sentence in judgment (drafted by P).**
2. BUT: No ethical duty to notify court if jail misinterprets sentence.
3. Rhetoric: Lawyers should be “beyond reproach.” Reputation as truth-tellers.
4. Actually: This is about the *courts* being beyond reproach. Otherwise, duty would apply to jail too. Protecting tribunal’s interest in being truth-teller.
5. Different model of attorney’s role in Ohio and TX. This is about recognizing when the fight is over. Adversarial process has ended. Now lawyer must vindicate result as officer of the court. (Diff. from TX’s conception).

D. COMMUNICATIONS WITH THIRD PARTIES

- a. Note: Less fundamental to lawyer’s role. Prof doesn’t seem to group this topic under true duty of candor. This is more about fine-tuning limits on zealous advocacy.
- b. Relevant Rules:
 - i. MR 3.3 (Candor) – (can’t figure out how this rule is relevant)
 - ii. **MR 4.1 (Truthfulness in Statements to Others) → no false statements**

ABA Model Rule 4.1 Truthfulness In Statements To Others

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

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

iii. **ABA Standard 4-6.2 (Plea Discussions) – how is this relevant??**

Standard 4-6.2 Plea Discussions

- (a) Defense counsel should keep the accused advised of developments arising out of plea discussions conducted with the prosecutor.
- (b) Defense counsel should promptly communicate and explain to the accused all significant plea proposals made by the prosecutor.
- (c) Defense counsel should not knowingly make false statements concerning the evidence in the course of plea discussions with the prosecutor.
- (d) Defense counsel should not seek concessions favorable to one client by any agreement which is detrimental to the legitimate interests of a client in another case.
- (e) Defense counsel representing two or more clients in the same or related cases should not participate in making an aggregated agreement as to guilty or nolo contendere pleas, unless each

client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved.

- c. **Mississippi Bar v. Attorney S.T. (Miss. 1993), p. 342 – can't lie about taping**
- i. ST's client is getting screwed by corrupt city government. ST tapes phone calls with judge and police chief. Chief asks, "Are you taping me?" ST says "No."
 - ii. **Majority rule: Taping itself is permissible. BUT: ST reprimanded for lying about it to the police chief.**
 - iii. Rationale: "Attorney's truthfulness must be beyond reproach."
 1. Not about enhancing adversarial testing – tape will be adversarially tested if used as evidence. And rule will prevent atty from ever obtaining some info (if must confess to tape recording).
 - iv. Dissent: No one should be able to surreptitiously tape. Not D nor P.
 1. "I would sanction Attorney ST for lying but I would also sanction him for the surreptitious taping."
 - v. Concurrence: Emphasizes that majority rules applies to Ps too.
 1. Note: This won't affect wire taps. No one there to lie about them. But: Could affect undercover agents. If rule applied to them, if asked, would have to answer, "Yes, I'm investigating you." B/c under supervisory rules, P responsible for acts of investigators.
 2. Effect: Will push prosecutors out of this process. Undercover operations will still happen. But prosecutors can't be involved. Trouble: Prosecutors (sometimes) know the law better than the investigators; might actually want them involved.
- d. **Att'y Grievance Comm'n of MD v. Rohrback (Md. 1991), p. 347 – dual ID**
- i. D is repeat DUI offender. Rohrback representing D for recent DUI offense. While out on bail, D gets arrested for another DUI. Gives a false name and fake ID, with the name "Boland," instead of "Asbury." D's reason: Wants to get bail. Won't be released on bail if judge knows he's already on bail for other DUI.
 - ii. D calls Rohrback. Tells him. Rohrback encourages him to reveal his "dual identity." But ultimately represents him.
 - iii. **Majority: Approves overall conduct. No categorical rule against representing D w/ known false identity.** Only faults lawyer on "foot fault." Analyzes three questionable acts:
 1. (1) Arranges for bondsman.
 - a. Tells bondsman the truth. (Why? Probably protecting himself against this exact charge.) Then sits in back of room while D and bondsman sign the bail bond.
 - b. Court says this is OK. Rohrback just sat in back. Bondsman was "superseding" actor. Says OK that didn't affirmatively disclose that he had prior crimes.
 2. (2) Appears at "Asbury's" arraignment, stays silent
 - a. D pleads guilty as "Boland," unrepresented. Sees judge

- will just parole him. Calls for Pre-Sentence Investigation (PSI).
 - b. Then D arraigned as “Asbury,” accompanied by Rohrback. Judge calls for Pre-Sentence Investigation (PSI). Judge did not inquire about record, and Rohrback remained silent.
 - c. Court says this is OK. No affirmative duty to speak up. This is confidentiality.
 - 3. (3) Accompanies “Boland” to probation interview
 - a. Both cases PSIs assigned to same probation officer.
 - b. Rohrback accompanies D as “Boland” to probation interview. Calls officer and says he represents “Boland.” And D just didn’t show up for his interview as “Asbury.”
 - c. Court says this is where attorney violated ethics.
 - d. But note: If had merely represented D as “Asbury,” would not have been a problem. Atty just made a foot fault. Court is allowing the overall scheme.
 - iv. KEY: What do we want Rohrback to do, when D calls him and says he’s going to go forward as “Boland”?
 - 1. If we want him to refuse representation, must figure out which rules will channel him into taking that action.
 - 2. Could have a precise duty of candor that would not allow attorney to enter appearance for known false identity.
 - 3. The court’s rule doesn’t do this. Basically encourages lawyer to go through with it, even if he doesn’t think it’s a good idea.
 - 4. But there’s still a good chance won’t get away with it. The rule is unpredictable, b/c lawyer can’t know how it will play out.
 - v. Concurrence/Dissent:
 - 1. More clear rule. Attorney reads this and thinks, it would be near impossible for me to get away with this. Not going to do it. Attorney could first try to talk the client out of it. If client insists, only then withdraw.
- e. **United States v. Babb (1st Cir. 1986), p. 359 – no perjury at GJ**
 - i. Appeal from perjury prosecution for lies to GJ.
 - ii. Babb called to GJ; his name had come up in other testimony.
 - iii. Pros says, “You’re not a subject or target of the investigation.” → false. Babb is clearly at least a subject.
 - iv. Babb lies to grand jury. Then gets prosecuted for perjury. This is appeal from perjury prosecution.
 - v. 5A claim: Got fooled into self-incrimination.
 - 1. Babb’s argument is not very sympathetic: He should have warned me so that I didn’t commit perjury in the mistaken belief I could get away with it.
 - 2. Court dispenses w/ easily. He didn’t incriminate himself. He lied.
 - 3. Prof finds troublesome: The whole point of immunity is that you don’t know what he would have said, if he had been immunized.

4. D is essentially saying, “If I had known I was the subject of investigation, I would have remained silent. Then P would have only had choice to immunize me.” So can’t say I’ll only immunize you if you promise that what you say will be incrimination.
5. Immunity doesn’t protect against perjury.
- vi. **Rule: No right to be warned of status before testifying to GJ.**
- vii. Court disapproves of P’s lie. Violated ethics rules.
- viii. But Babb doesn’t get the windfall, b/c his perjury was not “product” of P’s misconduct. No right to be warned of status before testifying before grand jury.

VII. RELATIONS WITH WITNESSES AND OPPOSING PARTIES

A. REPRESENTED PARTIES

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.

- a. **No-Contact Rule (MR 4.2)**
 - i. Can’t talk to opposing party w/o his lawyer’s consent.
- b. ABA Comments:
 - i. Purpose: Protects against (1) overreaching by other lawyers, (2) interference with the client-lawyer relationship, and (3) the uncounselled disclosure of information relating to the representation.
 - ii. Applies even though the represented person initiates or consents to the communication. I.e., no “waiver” possible.
 - iii. Does not prohibit communication concerning matters outside representation.
 - iv. May not effectuate contact through another person.
 - v. Only applies when lawyer has actual knowledge of fact of representation; but may be inferred from circumstances.
- c. Rationales for No-Contact Rule:
 - i. Protect unwitting people from nasty lawyers
 1. But it’s the adversary’s client, not yours. We don’t usually do that. This rationale sort of breaks down.
 2. E.g., Lopez – protecting clients as such. Shortcoming: Doesn’t protect people w/o representation.
 3. E.g., Simmels, Chan – protecting Ds as such. Hard to justify.
 - ii. Protect adversarial system (by protecting atty-client relationship)
 1. Rule helps maintain not the adversary system directly, but the lawyer-client relationship as such, which we deem essential to the adversary system. Want to set up fight b/w equals.

2. Strong atty-client relationship → strong adversary system → good results. Less obvious connection than duty of confidentiality, but same purpose.
 3. System works better when people have lawyers → set up rules to incentivize people to GET LAWYERS! You'll be protected from other side if you get a lawyer.
 4. E.g., *In re Searer* – Victim's lawyer talks to D.
- d. Harms Prevented by No-Contact Rule:
- i. Change case – strategic case choice that can't undo, e.g., plead.
 - ii. Change evidence – e.g., say something that hurts him.
- e. This rule is harder for Prosecutors than Defense lawyers:
- i. Ethical duty begins at indictment, if not earlier. Lopez.
 - ii. Issues for Ps: Are federal Ps exempted from 4.2 by virtue of authority to carry out investigations? When does represented person become a "party"? What types of communications are forbidden (covert and overt)? To what extent is P ethically responsible for investigators? Communications about uncharged offenses? May P respond if D initiates contact w/o atty?
- f. **In re Brey (Wis. 1992), p. 369 – classic no-contact rule violation**
- i. DA visits D in jail. DA talks to D: discuss plea deal; forget about your lawyer; if you tell anyone about this conversation, I'll deny it.
 - ii. This is the paradigmatic violation of the rule.
 - iii. Note: D's already been in for months. Charged with: smoking joint and breaking into snack machine. Already been in jail longer than he'll be sentenced.
- g. **United States v. Lopez (9th Cir. 1993), p. 372 – D approaches P**
- i. Synopsis:
 1. Rationale for no-contact rule: Protecting clients.
 2. Unsurprising that leads to finding a violation—b/c disadvantaged Lopez in losing Tarlow as his attorney.
 3. Irony: Shortcoming—doesn't protect people w/o clients.
 - ii. Reduced to basic structure, this is Brey. P talking to D, w/o D's lawyer present, about the case. But context makes this difficult. Here, D is dissatisfied with his counsel.
 1. D's lawyer (Tarlow) said right off the bat: I don't represent people who cooperate with the government.
 2. Ethical issue: Decisionmaking issue—D gets to decide whether to plea. Lawyer could say: Don't hire me if you want to consider cooperation.
 3. But instead, if choice is b/w doing what you want vs. losing your attorney midstream, much harder. (Concurrence points this out.)
 4. Clear ethical tension b/w client and his lawyer. What can Lopez do? Likes Tarlow as his trial counsel. Doesn't want to fire

- Tarlow. But wants to find out the terms of the possible plea agreement.
- iii. D approached P.
 1. D wanted to cooperate out from under his counsel. Co-D's lawyer (Twitty) helps D to cooperate. Twitty brings D in. Prosecutor doesn't want to talk to D w/o his lawyer present. Go to magistrate to confirm that D wants to do it. P suggests that reason D doesn't want Tarlow in room b/c Tarlow is essentially house counsel (doesn't want word to get back to mob that he's cooperating). Magistrate confirms D wants to do it; then says, Go ahead. Prosecutor's argument: It's now OK to talk to D.
 - iv. Possible rationales for allowing?
 1. Waiver? No waiver possible. This is not a rule that the client can waive. This tells us that this rule is not simply to protect the client, as a right. Protecting other interests.
 2. Law authorizes? B/c rule is "No contact unless law authorizes." Judge approved it. What else can P do?
 - v. Court says Magistrate's decision *would* have authorized it. But doesn't b/c P misled magistrate by saying D's lawyer was house counsel.
 1. Creates rule where D's subjective reason for not wanting lawyer present must be communicated accurately by P to magistrate for authorization to be effective.
 - vi. Good rule?
 1. If want rules to govern lawyers' conduct, not very helpful.
 2. And may chill conduct that we want to happen. I.e., want D to talk about cooperation, if he wants to. Why? Crime control. Want Lopez to be boss of his decision.
 - vii. **No-contact rule gives lawyer a veto over Lopez's choices.**
 1. **But we want to give clients an "out."**
 - viii. **Better solution: Magistrate could have appointed attorney for D on this matter re: whether to talk to P.**
 1. BUT: Still no way to keep it from Tarlow, if plea deal fails. Proffer agreement: D will have to tell P what he would say if he were to cooperate, before P will make a deal with him. Proffer agreement says P won't use against him, unless D says something different at trial. Then P will give the statement to D's lawyer, to make sure can use at trial.
 2. Shows why Tarlow's no-rat policy is the real ethical problem here. D can't know if cooperating will be in his best interest. Shouldn't have to choose b/w counsel or cooperating.
 - ix. Remedy:
 1. No case-related remedy—would only be windfall for Lopez—don't want to do that. No prejudice here b/c Lopez got a new good lawyer.
 2. Note: Hard to reconcile with Gonzales-Lopez (if deprived of counsel of choice, per se prejudice). Lopez isn't claiming would

have won trial if had Tarlow. Just that he's deprived of counsel of choice. Possible way to reconcile: not deprived through erroneous court judgment – just through counsel's own policies.

x. Possible Rules:

1. (1) Allow P to appoint alternate counsel for plea discussion. Might have to switch out counsel. ← better!
2. (2) Stronger no-contact rule: If only way to talk to D is to switch out counsel, then not allowed.
 - a. Post-conviction, Lopez wants Rule #2 (to get relief). But while in jail, wanted Rule #1. We want a rule that allows a path for Lopez to have this conversation. Don't want it too strict that Lopez has no way out.

xi. Grievance Comm'n SDNY v. Simels (2nd Cir. 1995), p. 393 – “parties” in same “matter”

1. Issue: Whether improper for defense atty (Simels) to contact witness (Harper) w/o atty present.
2. Got signed affidavit from Harper exculpating his client (Davis) from subsidiary witness murder. (Note: Murder of witness relevant to underlying trial as “consciousness of guilt.”) Impeached Harper w/ it at trial. Surprised P (had no idea).
3. Boils down to issue: whether Harper and Davis were “parties” in same “matter.” (based on DR 7-104; substantially same as MR4.2).
4. **Holding: No violation of no-contact rule, b/c not parties in same matter.** Tortured interpretation of the word “party.”
 - a. Harper wasn't a party in Davis's case; and Harper and Davis haven't yet been charged in the witness shooting matter. Formalistic.
 - b. Therefore, not parties in the same matter. Thus, this professional courtesy isn't due.
 - c. Dicta: Court says not even co-Ds would necessarily be parties in same matter! (dicta only).
5. Rationale for no-contact rule: Professional courtesy.
 - a. Not about protecting clients—it's about professional courtesy. If we wanted to protect people, then rule would include those who are unrepresented too.
 - b. Leads to narrow interpretation of rule. B/c in tension w/ duty to investigate, advocate zealously. Broad interpretation of “party” would chill investigation.
 - c. This court is very concerned about implications of rule for BOTH sides. If don't want to hobble investigation for D's client, then don't want to put brakes on what Simels did.
6. Policy:
 - a. Allows Ps and Ds to conduct better pre-trial investigation. Don't want expansive ethics rules encumbering process.
 - b. B/c any rule would affect both Ps and Ds, Congress should

Speak clearly if wants to hinder law enforcement.

- i. Irony: 3 yrs later- McDade. Congress says, “thanks for checking w/ us, but we’re happy with whatever rules you come up with.”
 - c. Counter: Uncounselled statement from witness/potential co-D that could jeopardize his cooperation agmt w/ gov’t.
7. Good rule?
- a. From perspective of individual:
 - i. Harper and Davis are clearly adverse. Davis wants acquittal, Harper is hindering. Harper wants reduced sentence from shooting; has lost option for leniency (breach of cooperation by contradicting self under oath), by talking to Sebel.
 - b. From perspective of adversarial process:
 - i. Tougher. Want Harper’s decision to be made w/ counsel, to get most truthful testimony at Davis’s trial. If Harper worried about giving conflicting stories, might not cooperate.
 - ii. BUT: Want both sides to have equal shot at Harper.

xii. **In re Chan (SDNY 2003), p. 398 – limits Simels**

1. Limits Simels to its facts. Can’t overrule 2d Cir., but recognizes Simels has not been widely accepted.
2. Facts: Chan represents Underwood. U incarcerated w/ co-D Davis. U insists C come speak w/ Davis for info relevant to defense. Chan does so. Chan goes to talk to co-D Davis w/o Davis’s lawyer’s permission.
3. **HELD: Co-Ds are both “parties” in the same matter—need not be opponent.** Therefore, Chan committed violation; impose discipline. W/in literal terms of Rule.
 - a. Note: Distinction from Simels is pure fortuity—here, both have been charged already.
4. RATIONALE: Moves away from “professional courtesy” idea; **Finds rule protects defendants, including co-Ds** (not just clients, as in Lopez). Under that view, no way to allow co-D to talk to Chan w/o going through lawyer.
5. Drawback: If U were pro se, would be free to talk to co-D (co-Ds can talk to each other). Part of price of getting a lawyer is that you don’t get the same evidence you could get if pro se. (B/c Lawyer can’t get someone else to do indirectly what he can’t do directly.)
6. Note: None of these rationales make much sense. Hard to justify rule based on interests of clients as such (Lopez) or defendants as such (Simels and Chan).

xiii. **In re Searer (W.D. Mich. 1996), p. 402 – functional “party”**

1. Searer is counsel for victim in kidnapping and sex crime.

- a. Note: Victim is not a “party” in matter – in 2d Cir. (Simels), no-contact rule doesn’t apply!
2. Searer calls D’s lawyer O’Hara to suggest plea negotiation. O’Hara hangs up on her. D calls Searer 2 days later—says he wants to talk, and that O’Hara changed his mind. Searer goes and talks to D w/o confirming w/ O’Hara. Court finds out b/c D says he got cigarettes from Searer. Court recommends for discipline.
3. **Held: Violation.** Formal order of reprimand appropriate.
4. Rationale: Reasons from first principles.
 - a. **Overall goal: Protecting adversarial system.**
 - b. **Ideal way to accomplish: Everyone gets lawyer. Foster relationship w/ lawyer. One way to protect: protect from overreaching from another lawyer.**
 - c. Reason why doesn’t reach unrepresented parties: B/c protecting the relationship.
 - d. Gives incentive to get representation: You’ll be protected from the other side if you get a lawyer.
 - e. Brushes past technical distinctions of party and matter—interpret the rule to satisfy its goals. Interpret to incentivize people to do what we want, which is GET LAWYERS.
5. Revisit Chan:
 - a. Underwood might be dissuaded from seeking counsel b/c won’t be able to talk to co-D.
 - b. One solution: Make a co-D exception to the rule, then just rely on counsel to say don’t talk to co-D.
6. Searer:
 - a. Clean rule: If you have interests that may be adverse to someone else, get a lawyer.
 - b. If you go on your own, you may get hurt.
7. Note: Different rules in different jxs gets confusing. With McDade rule, have to assume most stringent rule binding on you. But less of an issue now b/c of Holder Memo.

xiv. Holder Memo (DOJ Policy)

1. DOJ policy re investigating and charging corporations—allows corps to investigate their own people, then turn it over to show they’re cooperating. This made it less of an issue.
2. Note: Prof says we don’t have to know this.

B. WITNESSES

a. Model Rules 3.4, 4.3

- i. **MR 3.4(f) → can advise to take the 5th if not adverse to witness’s interests**

ABA Model Rule 3.4 Fairness To Opposing Party And Counsel

A lawyer shall not:

(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 or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

ii. MR 4.3 → if witness is adverse, can only advise to obtain counsel.

ABA Model 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.

b. ABA Standards 3-3.2 (P); 4-4.3 (D)

i. ABA Standard 3-3.2 → P should advise of 5A rights if law requires; but shouldn't threaten prosecution if subjectively intend to chill testimony

ABA Standard 3-3.2 (Prosecution) Relations With Victims and Prospective Witnesses

(a) A prosecutor should not compensate a witness, other than an expert, for giving testimony, but it is not improper to reimburse an ordinary witness for the reasonable expenses of attendance upon court, attendance for depositions pursuant to statute or court rule, or attendance for pretrial interviews. Payments to a witness may be for transportation and loss of income, provided there is no attempt to conceal the fact of reimbursement.

(b) A prosecutor should advise a witness who is to be interviewed of his or her rights against self-incrimination and the right to counsel whenever the law so requires. It is also proper for a prosecutor to so advise a witness whenever the prosecutor knows or has reason to believe that the witness may be the subject of a criminal prosecution. However, a prosecutor should not so advise a witness for the purpose of influencing the witness in favor of or against testifying.

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ii. ABA Standard 4-4.3 → D need not caution re 5A rights

ABA Standard 4-4.3 (Defense) Relations With Prospective Witnesses

(a) Defense counsel, in representing an accused, should not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) Defense counsel should not compensate a witness, other than an expert, for giving testimony, but it is not improper to reimburse a witness for the reasonable expenses of attendance

upon court, including transportation and loss of income, attendance for depositions pursuant to statute or court rule, or attendance for pretrial interviews, provided there is no attempt to conceal the fact of reimbursement.

(c) It is not necessary for defense counsel or defense counsel's investigator, in interviewing a prospective witness, to caution the witness concerning possible self-incrimination and the need for counsel.

(d) Defense counsel should not discourage or obstruct communication between prospective witnesses and the prosecutor. It is unprofessional conduct to advise any person other than a client, or cause such person to be advised, to decline to give to the prosecutor or defense counsel for codefendants information which such person has a right to give.

(e) Unless defense counsel is prepared to forgo impeachment of a witness by counsel's own testimony as to what the witness stated in an interview or to seek leave to withdraw from the case in order to present such impeaching testimony, defense counsel should avoid interviewing a prospective witness except in the presence of a third person.

c. Defense Counsel Communications

- i. See Green Article, p. 415
- ii. RULES:
 1. Cannot tell witness to shut up. Obstruction, tampering.
 2. Cannot give advice that is adverse to W's interests.
 3. Cannot give any advice besides "get a lawyer" if W is adverse.
- iii. Can lawyer inform W of 5A right not to testify?
 1. Green: Yes, can inform of 5A right. Just information. After all, everyone knows about it anyway.
 2. Prof: This is clearly advice. Both lawyer and W know the message is "Shut up."
- iv. Can lawyer advise W to invoke 5A right?
 1. Green: Can give advice so long as W's interests won't be adversely affected. See MR 3.4. If W involved in crime, then could incriminate himself. Therefore, invoking 5A not adverse to his interest.
 2. Prof: Green's assumption is unrealistic. If W goes into GJ by himself and invokes 5A, it will be really bad for W. P will bring pressure to bear on him. Won't stop until he pleads to something. Whereas, if W got his own lawyer, would go to P and try to cut a deal, b/f ever even going before GJ.
- v. Upshot:
 1. If rule is designed to protect D:
 - a. Then lawyer allowed to give advice to W.
 - b. But on thin ice. Most anything you say to W is really being driven by your representation of D.
 - c. Note: Also, creating potential conflict of interest – P will claim you told W to shut up, you will have to defend yourself, will create conflict of interest w/ D.
 2. If rule is to protect system:

- a. Then only want lawyers to say, “I’m not your lawyer. Get a lawyer.” System works best when people have lawyers.

d. Prosecutor’s Communications

- i. **See Green Article, p. 422**
- ii. Question: What if P hints to D’s witness that if he commits perjury, he’ll prosecute? Ever crossing the line?
- iii. After all, might be truthful. And avert criminal behavior designed to undermine integrity of justice system.
- iv. But might intimidate W - chill ability to put on defense.
- v. **ABA 3-3.2(b) (P’s relations w/ Witnesses):**
 - 1. P should warn W if may be subject to criminal prosecution.
 - 2. But, P cannot warn W of perjury prosecution if subjectively motivated by desire to chill testimony.
- vi. Green:
 - 1. Substantial interference w/ D’s W’s unhampered decision to testify violates D’s DP rights.
 - 2. Perjury warnings viewed most favorably by courts where P has actual evidence of inconsistency.
 - 3. Overall principle: P can’t warn W of perjury prosecution if amounts to a threat of retaliation.
 - a. Violates D’s 6A right to compulsory process and DP right to present a defense – can result in new trial.
- vii. Prof:
 - 1. W/o question, P can convey risk of perjury prosecution through his interview questions of W – showing W’s statements don’t jive w/ other evidence.
 - 2. P can indict W for crime to prevent W from testifying at D’s trial, so long as enough evidence against W.
 - a. Troubling. D loses his witness. But no way to police. Subjective intent is hard to administer. DP claim only if egregious. Ethics rules (professional assoc) can’t tell government when to indict.
 - 3. P can use interview to preview rough cross-examination of W, so that W will tell D’s counsel, and D will decide not to have W testify after all.
 - a. This is adversary system at work – put forward best witnesses. (Though unsettling.)

e. Compensating Witnesses

- i. **MR 3.4(b) → shall not give inducement to witnesses.**
 - 1. Rule 3.4 Fairness To Opposing Party And Counsel. “A lawyer shall not: . . . (b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law.”
- ii. **Florida Bar v. Machin (Fla. 1994), p. 433 – trust fund**

1. D's atty offered to set up trust fund for V's child on condition that she not testify at D's sentencing hearing.
2. Holding: Lawyer who tries to buy a V's silence at sentencing prejudices the administration of justice (even if V declines offer).
3. Result: Suspension for 90 days.

f. Preparing Witnesses

i. MR 3.4(b) → shall not counsel/assist witness to testify falsely

1. Rule 3.4 Fairness To Opposing Party And Counsel. "A lawyer shall not: . . . (b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law."

ii. State v. McCormick (N.C. 1979), p. 446 – no coaching false testimony

1. Coaching a witness is cured by cross-examination. Ethics is only concerned with coaching FALSE testimony.

iii. State v. Earp (Md. App. 1990), p. 447 – may not "align" stories

1. P's showing V's deposition video to 4 Ws was improper. Remedy: disclose P's conduct to jury.
2. Putting all Ws in same room to align stories is not OK.

VIII. LIMITATIONS ON ZEALOUS ADVOCACY

Generally, rules here are pretty clear – come from courts, constitution, not ethics. But question is *sanction* – affect the case, or the lawyer?

A. DISCOVERY (PROSECUTOR'S OBLIGATION)

a. U.S. v. Isgro (C.D. Cal. 1990), p. 479 – former trial testimony

- i. AUSA prosecuting Isgro doesn't turn over former trial testimony of his main witness, DiRicco. At former trial, W not only exonerated himself, but also exculpated all the current Ds. Diametrically opposed to his testimony at D's trial.
- ii. AUSA doesn't turn over the transcript, or indicate it exists. Though did tell D that W had been convicted of prior offense. And trial transcript was public record. Eventually Ds find it (soon before trial). Understandably upset.
- iii. AUSA (1) doesn't tell GJ about it; and omits the transcript from (2) Brady material, and (3) Jencks Act material.
 1. **Brady rule:** get appellate relief if P suppressed exculpatory evidence (i.e., material and favorable to D). But note: can't suppress public record. No possible Brady violation here. Brady is not a disclosure rule per se, but courts treat it that way b/c don't like hearing P say I didn't have to give it over b/c public.
 2. **Jencks Act:** statute that requires giving prior reported testimony of testifying witness. Must hand over upon finishing direct examination of witness (or earlier).

- iv. Everyone agrees P acted wrongly. Question is remedy.
- v. District Court: case-related: dismisses indictment w/ prejudice.
- vi. Reasons:
 - 1. (1) Usurped power of grand jury (5A right). This is flat wrong. Grand Jury is just supposed to pass on whether there's enough evidence to prosecute—not hear all the sides. This was wrong even before Williams. After Williams, clearly wrong. Note: Duty of candor can make colorable claim here—duty to present both sides. Like in Dodge case. Court doesn't really talk about.
 - 2. (2) Brady violation. This is also wrong. Can't suppress public record. No possible Brady violation.
- vii. Is case-related sanction a good remedy?
 - 1. Against:
 - a. Just b/c P did wrong, D shouldn't get a windfall.
 - b. D's argument that wouldn't have been indicted at all if transcript revealed is just false.
 - c. Seems wrong to take P's prior conduct into account – if did this to many Ds, why only 1 D get windfall?
 - 2. For:
 - a. Don't want to overshoot. If personally sanction P, will stay away further away the line. If we want him to get close, case-related sanction better.
 - b. Give D incentive to investigate. D is in best position to ferret out the wrongdoing. But have to give D a benefit to induce him to do it. In that sense, not a windfall—actually deserve it, b/c you worked for it. You're helping police the system. (Windfall goes to the degree of sanction.)

b. **United States v. Isgro (9th Cir. 1993), p. 485 (appeal)**

- i. Reverses district court.
- ii. No right to “fair” GJ hearings. Williams.
- iii. No prejudice. Only at indictment stage.
- iv. Refers for sanction to OPR.
- v. But OPR is w/in DOJ – his boss! Can discipline him. But can't disbar him. Prof thinks should have sent him to the Bar.

c. **OPR Report on Investigation of Misconduct (1994), p. 489 – subjective intent**

- i. Issues written reprimand.
- ii. Reason:
 - 1. He's about to retire; good prior record.
 - 2. **Subjective intent.** He didn't mean to do anything bad.
- iii. Relevance of subjective intent?
 - 1. For case-related sanctions, irrelevant. Worried more about effect on D. Goal: Trying to make D “whole.”
 - 2. For attorney-related sanction, makes sense. Akin to criminal context – we care about mens rea. If P didn't mean to, just

screwed up, less punishment: Less culpable; Harder to deter innocent mistake; Less likely to be recidivist. Goal: Trying to make the system work.

B. PRESENTING EVIDENCE

a. Cross-Examining Truthful Witnesses

- i. **U.S. v. Wade** (1967) (J. White) – D counsel can impeach a witness to best of ability, even if thinks W is telling the truth. In adherence to adversary system, “we countenance or require conduct which in many instances has little, if any, relation to the search for truth.”

b. Honest but Misleading Testimony

- i. **Michigan Opinion CI-1164 (1987)**: A defense lawyer may present any evidence that is truthful. Can’t evidence-tamper; but if no tampering, allowed to put on truthful testimony. Even if in conjunction w/ V’s erroneous testimony, results in incorrect inference in D’s favor. “The victim’s mistake concerning the precise time of the crime results in this windfall defense to the client.”
- ii. Right to present a “false” defense, i.e., ask jury to draw inferences from circumstantial evidence that lawyer knows to be false? Consider:
 1. **Jones v. Barnes** (U.S., nature of 6A right) – majority’s view about role of 6A counsel: only about enhancing reliability.
 2. **Nix v. Whiteside** (U.S., perjury) – lawyer must wash hands of client who wants to commit perjury.
 3. **Lauersen** (SDNY, candor) - Ethical obligation not to put on arguments that are inconsistent w/ client’s proffer statement.
 4. **Velez** (2d.)/**Krilich** (7th) – P can condition proffer on D’s waiver of right to object to P’s introducing proffer as substantive evidence against D to rebut any evidence offered or elicited, or factual assertions made (in cross, direct, opening, or summation).
 5. **Michigan Opinion CI-1164 (1987)** – D can present all truthful evidence, even if results in erroneous inference for jury.

C. SUMMATIONS

- a. For bad summations, remedy will depend on court’s view of system:
 - i. Adversarial system as producing reliable verdicts → no reversal w/o substantial prejudice. E.g., **Modica**.
 - ii. Attorney as officer of the court in helping it do its job of only presenting proper evidence/arguments → sanction. E.g., **Salitros**.
 - iii. Note: Only bad P summations can arise on appeal (only D can appeal)!

b. MR 3.4(e) → no personal assertions, vouching, or irrelevant info

ABA Model Rule 3.4 Fairness to Opposing Party and Counsel

A lawyer shall not . . . (e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal

knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused

- c. **U.S. v. Modica (2d Cir. 1981), p. 514 – bad summation/no remedy**
- i. D tries to frame airport employee for heroin luggage. Employee Amato testifies poorly.
 - ii. P’s summation:
 1. (1) “I’m here to tell you that Amato’s testimony is truthful.” (vouching)
 - a. P vouching for witness’s credibility.
 - b. Problematic: Jury will credit P’s opinion, b/c assume he has special access to the truth, has seen other evidence. But no cross-examination → “unsworn witness” problem.
 2. (2) Suggestion that Amato testified poorly b/c he was “scared” of a mysterious third party associated with D.
 - a. Problematic: Similar to #1. Jury will assume P knows more than he does. Assertions not based on evidence → no cross-examination → unsworn witness problem.
 - b. Also: Don’t want jury verdicts based on fear of vengeance from third party out there in world.
 3. (3) “Don’t let Mr. Modica walk out of courtroom laughing at you.”
 - a. Appeal to emotions.
 - b. Jury verdicts should not be based on jury emotion. Creates distortion in their deliberations.
 - c. P’s job is to prove beyond reasonable doubt. If not, D walks. Doesn’t matter whether D is laughing.
 - iii. Court quickly decides P’s conduct was bad.
 - iv. But holding: **NO REVERSAL, b/c no substantial prejudice.**
 1. Only deprived of DP right to fair trial if there is substantial prejudice.
 2. Here, no substantial prejudice, b/c:
 - a. (1) Minor aberration; prejudice did not permeate entire case;
 - b. (2) No effort by judge to cure; (← this is bad)
 - c. (3) Strong evidence of guilt.
 - v. Court finds no substantial prejudice, upholds conviction. (But warns that will reverse in the extreme case.)
 - vi. Appropriate remedy? *Modica* court threatens both types of sanction, but does neither.
 1. Case-related?
 - a. Would only apply to Ps (b/c only Ds can appeal).
 - b. No reason to give D windfall if would have been convicted anyway (only reverse in extreme case).
 - c. Deterrent value is low—P’s are often young, will already have turned over before deterrence can take hold.

- d. Further, Ps operate under immediate supervision of judges—easier to regulate than, e.g., law enforcement behavior.
- 2. Attorney-related sanction?
 - a. Could hit both Ps and Ds (unlike case-related).
 - b. Court recommends trial judges intervene quickly, and immediately give curative instruction.
 - c. Recommends trial judges be more willing to impose sanctions.
 - d. But none here—P’s improper summation only warranted “prompt admonishment and curative instructions by the District Court.”
- 3. Why not administer discipline here?
 - a. Worry that it can deter too much. Could chill legitimate argument. E.g., plea agreements for cooperators—stringent in order to sort of “vouch” for credibility—discussing in summation could go right up to the line. P will do it if only face reversal (especially if low-stakes case). But won’t even try it if sanction he’s facing is suspension.

d. State v. Salitros (Minn. 1993), p. 523 – bad summation/reversal

- i. P’s summation (bad; similar infractions as in Modica):
 - 1. Constitutional protections are only for the innocent;
 - 2. Accountability argument (like don’t let him laugh at you);
 - 3. Belittling defense in the abstract (D’s raise this defense when they have nothing else...)
- ii. Precedent that all of these things are wrong. But: D’s counsel did not even object (unlike in Modica). And D can’t prove prejudice.
- iii. **Holding: REVERSAL** of conviction (through court’s supervisory powers). (even w/o prejudice, and D didn’t object!)
- iv. Rationale based on attorney’s role:
 - 1. **Attorney is an advocate; BUT: can’t be a zealot or mouthpiece.**
 - 2. “Attorney’s role is to ensure client’s case is decided not on basis of extraneous matters, but on basis of evidence presented and legitimate inferences from that evidence.” → makes atty sound more like the judge! Judge is supposed to decide which evidence/arguments are proper!
 - 3. Could make argument that all counsel have some obligation to avoid faulty arguments, etc. But cost: Takes away from zealous advocacy.
 - 4. Court’s focus: Helping out system.
- v. In *Salitros*, court is more worried about how profession conducts itself, rather than the cost.
 - 1. System: Attorney as officer of court.
 - 2. This system WAS undermined.
- vi. In *Modica*, more worried about the outcome. Got reliable result here; so

remedy shouldn't impose cost on system that is being preserved.

1. System: Adversarial system, as such.
 2. This system was NOT undermined, so long as adversarial process reached reliable result.
- vii. Further explanation: *Salitros* is a lower level case (burglary and theft)—don't view societal cost as that great.
1. Court claims it has reached its breaking point—too many warnings, need to take action. But probably no more than in 2d Cir.

e. **Bell v. State (Florida Ct. App. 1998), p. 527 – suggests ethics regime**

- i. Majority affirms conviction based on harmless error.
- ii. Concurrence: No good remedy/solution if wait until it happens.
- iii. Plus, we know that Ds do it too (just don't see it on appeal).
- iv. Let's find a way to prevent it—ethics regime is well suited to do this. Set up regime where have responsibility to educate yourself about this stuff. Will reduce occurrence. Will be more willful when it happens. And feel better about sanctioning them now—should know better.
- v. Solution: Create videotape demonstrating improper closing arguments. Each new attorney must view. If violate, must view again. After two or three viewings, more serious sanctions should be imposed.

IX. LIMITS ON LAWYER SPEECH

A. PUBLICITY

a. **MR 3.6 → no extrajudicial statements that could prejudice proceeding**

ABA Model Rule 3.6 Trial Publicity

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

- (iii) the fact, time and place of arrest; and
 - (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.
- (c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.
- (d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

b. MR 3.8 → no extrajudicial comments that could bias jury pool

Rule 3.8 Special Responsibilities Of A Prosecutor

The prosecutor in a criminal case shall: . . . (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.

c. Del. Rule 3.6 Trial Publicity (same as Model Rule 3.6)

- i. Basics:
 - 1. Lawyer shall not make extrajudicial statement that will be disseminated by public communication and will have substantial likelihood of materially prejudicing an adjudicative proceeding.
 - 2. BUT: Can state information contained in a public record → can use speaking indictment.
 - 3. AND: Can counter adverse publicity.
- ii. Why have this rule?
 - 1. Adversarial process → potential to pollute the jury pool. Not clear why have the rule beyond jury contamination.
 - 2. Attorney's role as minister of court.
- iii. Clash b/w protecting process and protecting client.
 - 1. Cost of limiting speech: less zealous advocacy.
 - 2. Rule tells us that here, protecting the process wins.

d. U.S. v. Cutler (2d Cir. 1995), p. 535- can't prejudice jury pool

- i. John Gotti mob boss. AUSA called "a murder, not a folk hero." Cutler made a bunch of statements criticizing Ps, Ws, and evidence.
- ii. How could it help Cutler's client to say stuff like this?
 - 1. Announcement of charges may already skew jurors' opinions—maybe D is already in a deficit—needs some PR. But theoretically, the Rule already accounts for that.
- iii. If cannot speak in way to alter adjudication, what could lawyer say that

could help his client?

1. Not clear. Rare case: Martha Stewart—publicity might help keep her store open.
2. But for usual criminal—not worried about people thinking you’re a criminal—more worried about getting convicted as a criminal.

iv. Rule 3.6:

1. Materially prejudice → that’s easy to determine.
2. **“Extrajudicial statement” → creates a big loophole.** P can use “speaking complaint” to lay out all the facts. Then can talk about it at press conference: “According to the complaint filed today, ...” → huge loophole!!! Can start getting people to think about D as guilty.

v. Indictment:

1. Just states that GJ found PC; doesn’t have to state facts; in fact, rule against surplussage; D must stand trial once filed.

vi. Complaint:

1. Bring D into court, probable cause for arrest determined, but don’t decide whether to bring charges; can hold D in detention while seeking indictment. Can lay out all the facts to show PC – throw everything in.
2. “Speaking complaint” – has everything in it.
3. Whenever case starts w/ complaint, antennae should go up. E.g., Spitzer- client 9 – that was a speaking complaint.

vii. Facts:

1. Cutler: Gotti’s Defense attorney. Says inflammatory things. P makes prejudicial public statements too. Judge tells both sides to stop doing it (follow Local Rule 7). Cutler keeps doing it. Cutler gets disqualified from case.
2. Judge tells Cutler to show cause why not in contempt.
3. Judge recuses, appoints special prosecutor. (Conflict of interest—can’t be impartial judge, when issue is that he criticized YOU. Also, judge is a fact witness.)
4. Cutler goes to trial, is found guilty.

viii. **RULE: Rule doesn’t technically require showing of jury prejudice. But court interprets it as requiring likelihood of prejudicing jury pool, to avoid possible constitutional problem.**

1. 1A free speech.
2. 6A right to counsel – if cannot show prejudicing jury pool, but statements are helpful to D’s case, then should be able to make those statements.

ix. **HOLDING: Cutler’s statements WERE reasonably likely to prejudice jury pool.**

1. Cutler’s statements:
 - a. Criticizes process (assume all Italians are mafia; dirty prosecutor tricks).
 - b. Criticizes witness (witnesses are bums);

- c. Inaccurate depiction of some of the evidence
 - i. Says tapes are same tapes on which Gotti was acquitted before (this is false).
- d. Accurate depiction of some of the evidence
 - i. Key charge is that he murdered the former boss. On the tape, he says he didn't do it (and he presumably didn't know he was being taped).
- 2. Which statements are more likely to prejudice jury? What is the concern for protecting jury trial process?
 - a. **Most concerned about statements about the evidence.**
 - i. If both incorrect and not likely to get corrected in front of jury → most worrisome. Nothing P can do to confront the jury's impression. Biggest worry for the system we're relying on.
 - ii. Statements that are correct, and that will come out in evidence → less worrisome.
 - b. Comments about the system → less worrisome.
 - i. Jury will see how the system works—will see D's opportunity to confront the evidence, etc.
- 3. To the extent that jury gets the wrong idea, and won't get corrected during the trial → worry about the integrity of the process. So biggest worry is D's statement re: same tapes.
- x. P's statement: D is a murderer, not a folk hero.
 - 1. Some of this will come out in trial—but will remain in jurors' minds. Will assume, P must know more than I do.
 - 2. A little worse when P does it, b/c jurors assume P knows more. Talking about what the evidence is, or the conclusions that it supports → BIG RISK.

e. Attorney Grievance Comm'n of Maryland v. Gansler (Md. 2003), p. 553

- i. MD prosecutor Gansler charged w/ violating Rule 3.6 by making statements to the press in four cases.
- ii. This grievance comm'n stemmed from FOUR different cases (see the reluctance to put before grievance comm'n – but time after time...)
- iii. Press conference statements:
 - 1. Commented on D's confession to police and evidence, before the charges officially filed.
 - 2. Stated that D has other crimes on record that will come out later.
 - 3. Claimed reversal of conviction was completely result-oriented opinion.
 - 4. Stated better to prosecute juveniles and have them acquitted than let them commit crimes with impunity.
- iv. Disciplinary treatment:
 - 1. Anything that is on public record → no sanction
 - a. Even though bad to say it. Even if buried deep in bowels of courthouse. Another reason why Ps love the speaking

- complaints.
2. Anything not on public record → sanction.
- v. Seems like we're really concerned about the stuff that's going to affect the process.
 1. Is public record the right dividing line? Are they actually accessible?
 2. No way to draw the line at anything less (1A problem and practical problem). Can't limit speech that is public.
 3. Hard to draw the line at "reasonably accessible," etc.—especially w/ internet.
 - vi. Why not regulate the charging document?
 1. Restrict what is in the public record.
 2. Problem: Entrenching on P's ability to bring the charges he wants. Don't want indictment to be found ineffective b/c didn't say enough.
 3. How do you make a rule that says, "Say just what you need to get the charge, but no more."
 4. Note: Aside from GJ context, only way of determining PC is in court; presumptively public.
 - vii. Two rationales:
 1. Impairment of adversarial process:
 - a. Stuff that's not public is punishable:
 - i. Statement about confession → clear problem for system → could run into exclusionary rule.
 - ii. Statement that thinks D is guilty → less problematic from a process perspective (probably wouldn't charge if didn't think guilty).
 2. Attorney's role as minister of the court
 - a. Similar to *Salitros*. Things that don't impair the adversarial process as much (e.g., P thinks D is guilty – residual worry that jurors will assume P knows more than they do – but minimal) → in this case, the worry is more that it violates the role of the prosecuting attorney.

B. PUBLIC CRITICISM OF JUDGES

i. MR 8.2: No recklessly false statements re qualifications or integrity of judge.

ABA Model Rule 8.2 Judicial And Legal Officials

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

- b. **Office of Disciplinary Counsel v. Gardner (Ohio 2003), p. 563**
 - i. This is silly.
 - ii. Lawyer goes way over the top in criticizing judge.
 - iii. Dissent says: don't need an ethics rule for this; just common sense.
 - iv. What's the harm to the system?
 - 1. None. This is far outside the concern of the system.
 - 2. Court says should be worried about people reading it. But no one reads it.
 - v. But what if people read it? Now people will worry that system is corrupt, etc.
 - 1. Do we need to sanction attorney?
 - 2. Better to counter just by issuing a thoughtful decision. Let public opinion make up its own mind.
 - 3. Not even good appearance: we're not arbitrary, and don't even say we're arbitrary.
 - vi. This decision is hard to defend on process perspective.

C. CRITICISM OF PROSECUTOR

- a. **Young v. Ninth Judicial District Court (Nev. 1991), p. 574**
 - i. State Sup. Ct. sanctions defense lawyer for bringing motion criticizing prosecutor for bringing capital case due to political motivation (charging for own self-interest).
 - ii. Struck a nerve. Sanctioned. \$250 fine. Required defense lawyer to make a prima facie case that there was improper motive.
 - iii. Reason: Worried about chilling proper advocacy. Want prosecutor to do his job w/o criticism.
 - iv. Reviewing court thinks sanction was unnecessary. But want to preserve power to do it—so uphold sanction.
 - v. But hard to defend on process/system perspective.
 - vi. Discussion is more about whether P was acting properly.
 - vii. Don't need anything more than D's motion to be denied (maybe w/ sharp opinion). Certainly don't need separate sanction for attorney.
 - viii. Both *Young* and *Gardner* are dumb—just courts taking things personally—fall under category of “get a life.”

X. **ATTORNEYS' FEES**

- a. **MR 1.5 → lawyer must charge reasonable fee**

ABA Model Rule 1.5 Fees

(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:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

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

(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 shall 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.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(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

(2) a contingent fee for representing a defendant in a criminal case.

(e) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;

(2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and

(3) the total fee is reasonable.

b. Wong v. Kennedy (1994), p. 814 – nonrefundable special retainers barred

- i. Wong is criminal D. Hires Kennedy as attorney (solo practitioner). Pays \$75,000 up front. Non-refundable retainer (no matter what, that money is attorney's). Two weeks before trial: another \$150,000. Then, if trial lasts more than ten weeks, then more money due. Then after two months, D discharges Kennedy; gets new lawyer. Wong wants the \$75K back. Lawyer won't return it.
- ii. Issue: Was the \$75K retainer fee a "special" non-refundable retainer (i.e., payment for services) or "general" retainer (i.e., for availability only)? If

special, then illegal.

1. General retainer: Paying for attorney's availability.
Nonrefundability is OK, b/c not paying for services. If services rendered, will pay more then.
 2. Special retainer: Paying for attorney's services. Nonrefundability is a problem, b/c getting money for doing nothing.
- iii. **Rule: Lawyer has to charge reasonable fee. Non-refundable special retainers impermissible b/c objectively unreasonable to get money for nothing.**
- iv. Holding: This is plainly a special nonrefundable retainer agreement → must be returned. But lawyer can get restitution for services rendered.
- v. Why allow general retainers?
1. If attorney needs to clear his schedule to adequately represent the D in case D's case goes to trial, will kill his practice. Needs to be sure he'll get paid for that time.
 2. Allows solo practitioners to practice in criminal justice. Otherwise couldn't stay in business. This type of retainer is protected – but must be very clear that's what the money is for.
- vi. If special retainer – just a premium for your services – we won't allow.
1. Disclosure has nothing to do with it. This is just about what we will and won't allow.
- vii. Note: No-contact rule issue here? D is represented, and is talking to another lawyer about his case. Rule: Cannot talk to represented party “in the matter.” What is the role of a new attorney entering a case? Not clear if rule applies here. But whenever talking to represented party – think if it's a violation. Ask if there's any downside to letting the other attorney know you're talking to him.

c. **In re Fordham (1996), p. 819 – excessive fees (DUI case)**

- i. DUI case for 21-yr-old kid. Father looked for lawyer—fees were b/w \$3K and \$10K. Then father was fixing alarm system at Fordham's house, talking about case. Fordham offers to take on case. Never done DUI case, but “how hard could it be?” Charges D an hourly rate of \$200/hr.
- ii. Note: Most retained criminal lawyers don't charge hourly – usually charge a flat fee, or some kind of scaled version.
- iii. Bills totaled over \$50K. Included all the time getting up to speed on DUI law.
- iv. Court finds fee rate was reasonable, and hours were performed in good faith. (Gov't tries to argue “safe harbor” b/c of this.)
- v. Court finds excessive fee.
 1. Note: If lawyer had said up-front, I will charge you \$50K, that would be OK. Need disclosure. Courts won't get into that.
- vi. But here, \$50K was way outside the realm of contemplation. Even though received bills on a monthly basis, in a tough position after a few months have passed. Economically, will cost more to cut losses and get out. But also, put in hard position criminally – might not get to delay trial for new

- lawyer to start.
- vii. **General Rule: Fee must be reasonable.**
 - 1. **But actually, court won't police in absolute terms. Just require disclosure – want clients to be able to make choice.**
 - viii. Local Rule: “A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence, experiences in the area of the law involved, would be left with a definite and firm conviction that the fee is substantially in excess of a reasonable fee.” Provides 8 factors. (see p. 820).
 - 1. Rule is aspirational. (don't actually enforce regularly.) Applies to both criminal and civil. (so in civil context, hourly rate can be better policed.) Set the standard, but policing mechanism is limited. Day-to-day policing isn't good for system. Just hit the extreme cases.
 - ix. Remember to always ask if we want enforcement that allows people to toe the line, or overshoot.
 - x. Closest examination of fee charged: in appointed counsel context. Appointed counsel must submit fees to the court.
 - xi. Very rarely a matter of “too much work.” Court doesn't want to say you worked too hard.

XI. PROSECUTORIAL DISCRETION

A. INTRODUCTION

- a. Types of choices we're worried about Ps making:
 - i. Politicization – prosecution to advance political goal
 - ii. Prejudice - Invidious classifications – race, religion, ethnicity (1A, 14A).
 - iii. Disproportionate punishment
 - iv. Personal power – prosecutors favoring friends, disfavoring enemies.
- b. Policing Mechanisms are no good!
 - i. But hard to police prosecutorial misconduct. Hard to come up with effective policing mechanism that's worth the cost. Limits on discretion are so general, not very effective.
- c. Self-regulation?
 - i. Law enforcement agencies' metrics of success reveal their emphases. Choice of statistical measure skews resources and incentives to work at a specific stage of the case. E.g., if get stat for arrest, will be more aggressive on arrests (won't care if bad arrest). If get stat for conviction, will be more conservative at arrest stage. E.g., DEA – keeps arrest statistics and amount of contraband seized. FBI – counts indictments. Some local – count convictions.

B. CHARGING DECISIONS

What factors Should Go Into Charging Decisions?

ABA Standards

ABA Standard 3-3.4 Decision to Charge

(a) The decision to institute criminal proceedings should be initially and primarily the responsibility of the prosecutor.

(b) Prosecutors should take reasonable care to ensure that investigators working at their direction or under their authority are adequately trained in the standards governing the issuance of arrest and search warrants and should inform investigators that they should seek the approval of a prosecutor in close or difficult cases.

(c) The prosecutor should establish standards and procedures for evaluating complaints to determine whether criminal proceedings should be instituted.

(d) Where the law permits a citizen to complain directly to a judicial officer or the grand jury, the citizen complainant should be required to present the complaint for prior approval to the prosecutor, and the prosecutor's action or recommendation thereon should be communicated to the judicial officer or grand jury.

ABA Standard 3-3.8 Discretion as to Noncriminal Disposition

(a) The prosecutor should consider in appropriate cases the availability of noncriminal disposition, formal or informal, in deciding whether to press criminal charges which would otherwise be supported by probable cause; especially in the case of a first offender, the nature of the offense may warrant noncriminal disposition.

(b) Prosecutors should be familiar with the resources of social agencies which can assist in the evaluation of cases for diversion from the criminal process.

ABA Standard 3-3.9 Discretion in the Charging Decision

(a) A prosecutor should not institute, or cause to be instituted, or permit the continued pendency of criminal charges when the prosecutor knows that the charges are not supported by probable cause. A prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction. **[Cannot initiate/maintain absent PC and sufficient admissible evidence NOW!]**

(b) The prosecutor is not obliged to present all charges which the evidence might support. The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that sufficient evidence may exist which would support a conviction. Illustrative of the factors which the prosecutor may properly consider in exercising his or her discretion are: **[NOTE: Individual prosecutor to consider!]**

(i) the prosecutor's reasonable doubt that the accused is in fact guilty;

(ii) the extent of the harm caused by the offense;

(iii) the disproportion of the authorized punishment in relation to the particular offense or the offender;

(iv) possible improper motives of a complainant;

(v) reluctance of the victim to testify;

(vi) cooperation of the accused in the apprehension or conviction of others; and

(vii) availability and likelihood of prosecution by another jurisdiction.

(c) A prosecutor should not be compelled by his or her supervisor to prosecute a case in which he or she has a reasonable doubt about the guilt of the accused.

(d) In making the decision to prosecute, the prosecutor should give no weight to the personal or political advantages or disadvantages which might be involved or to a desire to enhance his or her record of convictions.

(e) In cases which involve a serious threat to the community, the prosecutor should not be deterred from prosecution by the fact that in the jurisdiction juries have tended to acquit persons accused of the particular kind of criminal act in question.

(f) The prosecutor should not bring or seek charges greater in number or degree than can reasonably be supported with evidence at trial or than are necessary to fairly reflect the gravity of the offense.

(g) The prosecutor should not condition a dismissal of charges, nolle prosequi, or similar action on the accused's relinquishment of the right to seek civil redress unless the accused has agreed to the action knowingly and intelligently, freely and voluntarily, and where such waiver is approved by the court.

UNITED STATES ATTORNEYS' MANUAL:

USAM 9-27.220 Grounds for Commencing or Declining Prosecution

The attorney for the government should commence or recommend Federal prosecution if he/she believes that the person's conduct constitutes a Federal offense and that **the admissible evidence will probably be sufficient to obtain and sustain a conviction**, unless, in his/her judgment, prosecution should be declined because:

1. No substantial Federal interest would be served by prosecution;
2. The person is subject to effective prosecution in another jurisdiction; or
3. There exists an adequate non-criminal alternative to prosecution.

NOTES:

- Can indict on mere speck of evidence! Need only have **reasonable belief that evidence will be available and admissible at time of trial—in the future!**
- Exceptions are left to judgment of attorney (in consultation with manual).

USAM 9-27.230 Initiating and Declining Charges—Substantial Federal Interest

In determining whether prosecution should be declined because no substantial Federal interest would be served by prosecution, the attorney for the government should weigh all relevant considerations, including:

1. Federal law enforcement priorities;
2. The nature and seriousness of the offense;
3. The deterrent effect of prosecution;
4. The person's culpability in connection with the offense;
5. The person's history with respect to criminal activity;
6. The person's willingness to cooperate in the investigation or prosecution of others; and
7. The probable sentence or other consequences if the person is convicted.

NOTES:

- List not intended to be all-inclusive.
- **Probable sentence → P should weigh government resources (time and effort of prosecution) against the likely sentence** (weigh against “bang” of punishment!)
- If already serving long sentence, consider whether will meaningfully add to sentence, or if current sentence vulnerable to any attacks.

USAM 9-27.240 Initiating and Declining Charges—Prosecution in Another Jurisdiction

In determining whether prosecution should be declined because the person is subject to effective prosecution in another jurisdiction, the attorney for the government should weigh all relevant considerations, including:

1. The strength of the other jurisdiction's interest in prosecution;
2. The other jurisdictions ability and willingness to prosecute effectively; and
3. The probable sentence or other consequences if the person is convicted in the other jurisdiction.

NOTES:

- List of factors is illustrative only.
- **“The ultimate measure of the potential for effective prosecution in another jx is the sentence, or other consequence, that is likely to be imposed if the person is convicted.”**

USAM 9-27.250 Non-Criminal Alternatives to Prosecution

In determining whether prosecution should be declined because there exists an adequate, non-criminal alternative to prosecution, the attorney for the government should consider all relevant factors, including:

1. The sanctions available under the alternative means of disposition;
2. The likelihood that an effective sanction will be imposed; and
3. The effect of non-criminal disposition on Federal law enforcement interests.

NOTES:

- Examples of non-criminal approaches include civil tax proceedings, reference of complaints to licensing authorities or professional organizations such as bar associations; or pre-trial diversion.

USAM 9-27.260 Initiating and Declining Charges—Impermissible Considerations

In determining whether to commence or recommend prosecution or take other action against a person, the attorney for the government should not be influenced by:

1. The person's race, religion, sex, national origin, or political association, activities or beliefs;
2. The attorney's own personal feelings concerning the person, the person's associates, or the victim; or
3. The possible affect of the decision on the attorney's own professional or personal circumstances.

i. ABA Standards vs. DOJ Standards

a. Role of Prosecutor

- i. ABA Model: Strong current of individual conscience and responsibility.
- ii. USAM: About serving the sovereign. Policies set above your head.

b. Charging Decision

- i. ABA: *Individual* prosecutor considers factors:
 1. Personal doubt about guilt (3-3.9(i));
 2. Disproportionality of offense to punishment (3-3.9(iii)).
- ii. USAM: Decisions are set as matter of policy:
 1. Sets default of prosecution. USAM 9-27.220.

2. Balance government resources that must be expended against likely sentence.
 - a. Don't waste time on little stuff that someone will only get probation for anyway. USAM 9-27.230.
 - b. But if the punishment is big, no dissuasion. USAM 9-27.230(7). See cmt. No proportionality decision, like in ABA. In fact, operates in other direction. The longer the sentence, the more likely to pursue.

c. Amount of Evidence

- i. ABA: P should not initiate or maintain absent PC and sufficient admissible evidence to obtain conviction. ABA Std 3-3.9.
 1. Present Tense → AT ALL TIMES, need enough admissible evidence to CONVICT; otherwise, dismiss charges.
 2. "Initiate or maintain" → cannot maintain pendency of prosecution if evidence changes, e.g., witness dies.
- ii. USAM: If P thinks D is guilty (similar to PC); and probably WILL have enough evidence to sustain conviction, can initiate. 9-27.220.
 1. Future Tense → only need probability of having enough evidence in the future. Can indict earlier, on only a speck.
 2. Can maintain pendency of charges in spite of lack of evidence → e.g., could keep secret that key witness died, accept plea.
 3. Hypo: Could you indict two Ds on no admissible evidence, specifically so that one would flip on the other, resulting in testimony? Satisfies reasonable probability of having evidence in future.... Very aggressive. Prof doesn't know answer.

d. McDade – which is applicable?

- i. No state has yet adopted these ABA Standards.
- ii. But if local court adopted ABA Standard, then federal prosecutor would have to follow the ABA rule and could not follow USAM.
- iii. McDade says DOJ doesn't get final say – must live under local rules.

ii. Nichols v. Collins (S.D. TX 1992) – inconsistent theories

- a. This is about the role of the government – not lawyers. Judge is upset by sovereign's actions. Would *not* be cured by having 2 Ps instead of 1.
- b. 2 men, 1 bullet, both convicted of the murder. P tries them separately; in each trial, claim THIS D shot the fatal shot.
 - i. The prosecutor made logically contradictory arguments at the punishment phase for Williams and the trial for Nichols, eg "Williams is the individual who shot and killed Claude Shaffer." v. "Willie could not have shot him."
 - ii. NOTE: Not necessary. Could develop legal theory where both are responsible (e.g., Pinkerton liability) – both are the robbers with guns blazing.
- c. Trial Judge grants habeas petition – estoppel theory.
 - i. If first guy convicted, then second guy can't even be tried (estoppel).

- ii. What if first guy acquitted? Would that be estoppel too—b/c P committed to that theory? But acquittal may be jury’s expression that they think the second guy did it....
 - iii. Arbitrary – the first guy bears the brunt; second guy gets a chance at getting off.
 - d. Rule: P can’t take inconsistent positions. (but rev’d on appeal.)
 - i. The state is constitutionally estopped from seeking and obtaining findings of fact inconsistent with findings of fact from a different trial.
 - ii. Two individuals can be prosecuted for the same crime as long as “law and physics permit.” The law might have been written such that it doesn’t matter who fired the fatal bullet, but since it does matter, only one man can be convicted since physically only one man fired the bullet.
 - e. Reasoning
 - i. If different juries were allowed to find inconsistent interpretations of the same evidence, they could conceivably convict an unlimited amount of individuals for the same act that only one individual physically performed.
 - ii. The integrity of the judicial system commands that prosecutors seek truth and justice.
 - f. But don’t need this rule, even if don’t like what prosecutor did here.
 - i. D’s attorney can introduce P’s prior statement in first trial, that other guy fired the fatal shot – that should be enough to dissuade.
 - ii. Plus, **rule of candor** – can’t go forward w/ theory you know is incorrect. Here, P may not know which one is correct. But he knows they can’t both be correct. Rule of candor would require him to pick one, or do neither.
 - g. 5th Circuit reversed this case. We don’t need this rule.
- iii. **Freedberg v. U.S. DOJ (D.C. Dist. Ct. 1988), p. 606 – multiple prosecutions**
 - a. Mail order porn case. Prospective D is facing indictment in 4 different districts (has begun GJ investigations) for substantially same conduct (mailing porn). Trying to stop the indictment. Plaintiff claims that DOJ won’t stop until plaintiff goes out of business.
 - b. Unique procedural posture allows us access to this rule.
 - i. Prospective D filed lawsuit against DOJ to request preliminary injunction against indictment to vindicate 1st and 5th Amdt rights.
 - ii. DOJ filed **motion to dismiss** – Dist. Ct. must assume factual allegations in complaint are true.
 - iii. DOJ wants to say: look, we aren’t really going to indict him in 4 places at once so he can’t defend. But court has to accept these facts as true. Once we accept the facts as true, only way we can access the legal rule.
 - c. Note: not double jeopardy – each mail order offense is a separate offense.
 - i. Even though P essentially get 95 cracks at it.
 - d. **Holding: DP problem: Can’t defend yourself in two different places.**

- i. Simultaneous criminal prosecutions of same individual for same offense in four separate judicial districts violates DP since defendant cannot possibly physically defend itself in more than one district. Also, DOJ cannot try issues of fact in more than one federal district.
 - ii. Grants preliminary injunction – restrained from prosecuting in more than one judicial district.
 - iii. Easy due process decision – have to be able to defend yourself. Can’t dance at two weddings.
 - iv. DOJ loses tactical advantage, Plaintiffs face annihilation
 - v. Public interest = protecting constitutional right
 - vi. Addl note: court finds jurisdiction b/c criminal prosecution is not yet “pending.”
 - e. Will this rule have any effect?
 - i. No. Can keep bringing case in different jxs until nail the guy. Will bring in one jx, if don’t get it there, then will bring in the next, and so on.
 - ii. We may not like this result. Makes government look like a bully.
 - iii. But we want to keep that discretion – b/c a very successful criminal might keep winning – want to be able to get him.
 - iv. It’s built into our system of federalism/separate jx.
 - v. Problem will remain – but not particularly bad problem.
 - f. No appeal – settled the case. D agreed to go out of business, and P didn’t indict anywhere.
- iv. **United States v. Belcher (W.D. Va. 1991) – pros based on inadequate proof**
 - a. See ABA Std 3-3.9 Discretion in the Charging Decision
 - b. State prosecutor ADA (McAfee) goes after Belcher Bros at state level, but state destroyed the evidence of marijuana (unclear why).
 - c. McAfee is appointed AUSA. He moves to nolle pross state indictment and gets a federal indictment w. even more counts against both Belchers.
 - d. State dismisses the indictment. McAfee (the P) becomes a Fed; drafts indictment against the Brothers.
 - e. Court dismisses indictments against both brothers. Finds that prosecution following destruction of evidence violates due process, that collateral estoppel prevents Patrick’s prosecution, and that prosecution of Eddie for more than the single original count is vindictive.
 - i. If evidence is crucial to case, and destruction intentional, need not show state did it in BF to find violation of DP rights.
 - f. Court “pierces” dual sovereignty argument:
 - i. Dual sovereignty argument: double jeopardy blocks single jx from re-trying. But fed is another jx – we’ve never charged him.
 - ii. Some states have laws against this. E.g., NY state constitution precludes state indictment if already had federal jeopardy.
 - iii. But doesn’t work the other direction. Feds can still prosecute for exact same crime.
 - g. Why don’t we like McAfee’s behavior?

- i. Seems personal—has it in for these guys.
 - ii. **If the jx separation is a “sham and cover,” and you can easily move b/w them, then willing to pierce the veil, consider inappropriate.**
 - iii. But can easily evade this rule: get his friend to do it instead. Won't be able to avoid the vindictiveness.
 - h. Contrast with other case where consider fed's subsequent prosecution legitimate.
 - i. Question: is the political pressure legit, e.g., aggrieved community that wants justice, or illegit, e.g., blood-thirsty mob.
 - i. Want appropriate zeal. What's wrong with vindictiveness?
 - i. Hard to see what personal vindictiveness will add.
 - ii. **Difference b/w disinterested prosecutor and vindictive prosecutor → disinterested prosecutor will cut a deal that allocates office's resources effectively.** Vindictive prosecutor won't. Will result in misallocation. This is bad, and hard to see any benefit.
 - iii. But one P's vindictiveness is another P's persistence. Hard to police.
 - iv. This is really the only case that limits Prosecutorial discretion in this way.
- v. **Commonwealth v. Agnew (Pa. 1991), p. 618 – disparate treatment of Ds**
 - a. See ABA Std 3-3.8 Discretion as to Noncriminal Disposition
 - b. Facts: Agnew convicted of possession of small amt of coke and conspiracy. Sentenced to \$200 and 6 mos. DA did not consider placement in Accelerated Rehabilitation Disposition program (ARD) b/c crime was in the City of Chester. Policy: Diversion program for non-criminal disposition, so long as not buying drugs in this particular town. Makes sense from crime control and allocation of resources perspective. (Drug problem worse in city.)
 - c. Procedural Posture: direct appeal from sentence.
 - d. Issue: Did DA abuse his discretion by following arbitrary policy of refusing to recommend anyone who offended in City of Chester for ARD?
 - e. Holding: No, the policy of withholding ARD from City of Chester offenders is ok.
 - f. Reasoning:
 - i. PA caselaw, *Lutz*, says submitting case for ARD is subject to abuse of discretion review.
 - ii. PA caselaw, *Ebert*, requires that the DA openly specify reasons for not submitting a case to ARD and that the reasons relate to the protection of society or likelihood of rehabilitation.
 - iii. There is no suspect classification involved to raise this beyond rat'l basis.
 - iv. This policy relates to the protection of society, since it is trying to lower drug offenses in the City of Chester.
 - g. Worry: Racial make-up of town? Proxy for classification we don't allow?
 - i. Court allows. Classification isn't necessarily suspect.
 - h. But DP worry....

- i. Analogy: McCleskey v. Kemp (death penalty case) – brings stats to prove that black D killing white V more likely to get death penalty. SCOTUS rejects. If law isn't discriminatory, and can't prove application in YOUR case is discriminatory, won't intervene. Dissent: fear of too much justice.

C. PROSECUTOR'S CHOICE OF CASES

a. Mendoza Toro v. Gil (D. PR 2000), p. 164 – P can't pick her cases

- i. Mendoza Toro is AUSA in PR. Sues to enjoin boss from assigning her to prosecute trespassing violations on US Navy Base in Vieques, claiming such assignment would violate her 1A rights. People were trespassing to protest Naval exercises. She claimed moral conflict of interest.
- ii. Court rejects. It's her job.
- iii. **HOLDING: "No 1A right to choose work assignments."**
- iv. First Amendment issue:
 - 1. Her complaints are not matter of public concern; just personal feelings about her work duties.
 - 2. Further, work as AUSA is not "expression" protected by 1A.
 - 3. No 1A right to pick and choose work assignments.
 - 4. Whether foreseeable at time she applied for the job is irrelevant.
- v. "Conflict" issue:
 - 1. No conflict, b/c MR 1.2 clarifies representation ≠ endorsement.
 - 2. Conflicts = pecuniary or professional. Not personal beliefs.
- vi. **Underlying rationale: AUSA is agent of the sovereign.**
 - 1. Note: Client could make allowance to individual preferences by DOJ moving people around. But no legal claim.
- vii. Question: At what point do personal views become relevant to the *hiring decision*? Politicization? (E.g., views on Iraq, death penalty.)
- viii. This case tells us how courts view balance b/w individual prosecutors and sovereign.

D. PLEA BARGAINING DECISIONS

a. ABA Standards 3-4.1, 3-4.2, 3-4.3

Standard 3-4.1 Availability for Plea Discussions

(a) The prosecutor should have and make known a general policy or willingness to consult with defense counsel concerning disposition of charges by plea.

(b) A prosecutor should not engage in plea discussions directly with an accused who is represented by defense counsel, except with defense counsel's approval. Where the defendant has properly waived counsel, the prosecuting attorney may engage in plea discussions with the defendant, although, where feasible, a record of such discussions should be made and preserved.

(c) A prosecutor should not knowingly make false statements or representations as to fact or law in the course of plea discussions with defense counsel or the accused.

Standard 3-4.2 Fulfillment of Plea Discussions

(a) A prosecutor should not make any promise or commitment assuring a defendant or defense counsel that a court will impose a specific sentence or a suspension of sentence; a prosecutor may properly advise the defense what position will be taken concerning disposition.

(b) A prosecutor should not imply a greater power to influence the disposition of a case than is actually possessed.

(c) A prosecutor should not fail to comply with a plea agreement, unless a defendant fails to comply with a plea agreement or other extenuating circumstances are present.

Standard 3-4.3 Record of Reasons for Nolle Prosequi Disposition

Whenever felony criminal charges are dismissed by way of nolle prosequi (or its equivalent), the prosecutor should make a record of the reasons for the action.

b. Waiver of Rights as Condition of Guilty Plea

i. US v. Ruiz, 241 F.3d 1157 (9th Cir. 2001), p. 622 – no waiver of *Brady*

1. Facts: S.D. Cal. created “fast track” plea bargaining, which offers a two-level downward departure from guidelines in exchange for waiver of indictment, appeal, motions, and *Brady* material.
2. Ruiz declines this offer b/c she says asking to waive *Brady* is unconstitutional. She pleads guilty w/o offer, but argues she should still get the downward departure. Her range was 18-24, would have been 12-18, she got 18.
3. Procedural posture: direct appeal from sentence.
4. Issue: is it unconstitutional to condition a plea agreement on waiver of *Brady*?
5. Holding/rule: *Brady* cannot be waived under DP, b/c waiver can't be knowing and intelligent (b/c don't have info!). Therefore, Ps can't condition departure recommendation on waiving it.
 - a. General Rule: Ps may encourage waiver of constitutional rights in plea agreements (BUT: targeted rights must be capable of being validly waived.)
 - b. *Sanchez* says guilty pleas can't be knowing and voluntary if defendant lacks material info. Same goes for plea agreements.
6. Result:
 - a. Remanded for hearing and re-sentencing.
 - b. D must make a “substantial threshold showing” that gov't acted w/ unconstitutional motive (i.e., getting D to waive *Brady*) in refusing to move for downward departure. If so, entitles D to evidentiary hearing about gov'ts motives. If district court determines gov't acted w/ unconstitutional motive, can provide remedy (i.e., grant the departure).
7. Dissent:

- a. This ruins benefit of fast-track (creates huge work for P) and gives D info that is useless unless she is going to trial. Plus, this hurts future trials re: informants.
- 8. Note: This was overturned by SCOTUS unanimously in *US v. Ruiz*, 536 U.S. 622 (2002). But the precise issue was that Ruiz gave up impeachment evidence (a subset of Brady material). Open question whether we want the D to be able to waive truly exculpatory info though. (Note: fuzzy line!)

ii. **NC Eth. Op. RPC 129 (N.C. St. Bar 1993), p. 630 – no waiver of IAC**

- 1. Issue: Can D waive right to appeal/postconviction review?
- 2. **Holding: D can waive rights to appeal and post-conviction review, EXCEPT can't bargain away rights against IAC and Prosecutorial Misconduct.**
 - a. Defense counsel must inform client of the danger of this move.
 - b. Attorneys cannot make agreements that limit their liability for malpractice. At bottom, can't take away client's right to complain about bad lawyering.
- 3. Reasoning:
 - a. Partially about Johnson – knowing & effective waiver.
 - b. More about attorney's role. Unethical for attorney's to make these agreements. Element of self-dealing, since it focuses on effectiveness or misconduct of attorneys.
- 4. Generally, endorses idea we want to let willing participants make their bargains. Ps universally want waivers of appellate and post-conviction rights.
- 5. Question: Do we want a rule deciding this, or should we just hire people we trust?

iii. **Washington v. Moen, 150 Wn. 2d 221 (2003) – waiver of civil rights**

- 1. Facts: From tip, D is arrested for marijuana and his property seized. Gov't threatens forfeiture. In civil action for replevin, D has right to name of informant, demands it. Prosecutor refuses to plea bargain if D demands name of informant. Moen moves under state rule to dismiss case "in the furtherance of justice due to ... governmental misconduct..." Claims state's no-plea-bargain policy w/ Ds who successfully compel disclosure in civil case chills right to obtain discovery in civil case and violates DP. Denied.
- 2. Procedural Posture: Appealing affirmation of sentence by intermediate Ct App.
- 3. Issue: Did trial court abuse its discretion when denying D motion to dismiss? Holding: Nope.
- 4. Reasoning:

- a. *MacDonald* says you cannot threaten additional charges, or condition voluntary dismissal of charges, in order to frustrate civil proceedings.
- b. But here,
 - i. The civil action is against the city, the crim prosecution is by the state.
 - ii. The prosecutor is not trying to gain advantage in a civil action. Simply trying to create disincentive for Ds to compel disclosure of confidential informants, which are a valuable asset to state.
 - iii. Refusing plea bargaining isn't the same as threatening charges.
- c. Conditioning plea bargain on surrendering of constitutional rights does not by itself violate DP. Theoretical basis of ALL plea bargaining is that D waives constitutional rights.
- d. Plus, more aggressive prosecutions have been upheld.
 - i. E.g., P re-indicts on more serious charge if D refuses to plead to lesser charge.

5. KEY:

- a. **If P is trying to *deter* D from exercising legal right → usually OK;**
- b. **If P is *retaliating* for D's exercising a legal right → violates DP.**

6. Dissent

- a. Prosecutors are obliged to refrain from conduct that would deny life, liberty, property w/o due process
- b. *MacDonald* is not distinguishable from present case

7. Prof:

- a. Debate focuses on whether P's refusal to plea bargain amounts to retaliation for exercising rights.
- b. What kind of regime does this set up? If he's guilty and knows it, and his shot at beating the case is knowing who the informant is...

c. Packaged Plea Bargaining

i. **Martin v. Kemp, 760 F.2d 1244 (11th Cir. 1985) – threat against wife**

1. Facts:

- a. Sheriff Whidby asks Martin questions about burglary; Martin says he wants to consult a lawyer first. Whidby arrests Martin, mirandizes, Martin again asks for lawyer, Whidby continues to question him.
- b. Martin's wife, Teresa, shows up to post bail. She is 18 and 6-7 months pregnant. Teresa had lost the last pregnancy due to anxiety/stress.

- c. Whidby begins to question Teresa and threatens to press charges. He interrogates her for some time, charges her, and then sticks her in a cell with Martin, very nervous, her fingernails bitten bloody.
 - d. Martin pleads guilty so Whidby will drop the charges against Teresa.
2. Procedural posture:
- a. Martin does not appeal but files state habeas. Denied b/c plea voluntary. Higher state court denies cert to appeal state habeas decision. Martin files federal habeas; denied b/c district ct determines from transcripts that police had PC to question/charge Teresa. Plus Martin's guilty plea negated claims of denial of counsel during his interrogation. Re: decision to plead guilty, IAC claim denied. Here on appeal from district ct's denial of habeas petition.
3. Issues
- a. Did the threats against Teresa, even if they were legal, render Martin's confession and guilty plea involuntary?
 - b. Was Martin's counsel ineffective b/c she recommended pleading guilty in these circumstances?
- 4. Holding: Remanded for evidentiary development re: voluntariness of plea. If threats to prosecute were not grounded in GF belief in PC against Theresa, then rendered plea involuntary.**
5. Reasoning
- a. Knowing and voluntary guilty plea waives all nonjurisdictional challenges.
 - b. District court could have reviewed state court determination of voluntariness since it is a mixed question of law and fact.
 - c. Where D alleges guilty plea induced by gov't threats to prosecute third party, and P makes no effort to specifically deny threats, P's prior attestation that his plea was voluntary is not an absolute bar to subsequent claim that pleaded guilty only to protect third party.
 - d. Martin has a heavy burden to show that at the time Whidby was threatening Teresa, he did not have PC. District ct erred in analyzing PC ex post, so remanded for hearing as to PC at the time Whidby threatened Teresa.

d. Waiver of Rights in Proffer Agreements

- i. US v. Krilich, 159 F.3d 1020 (7th Cir. 1998) – can't elicit inconsistent**
 - 1. Krilich covers up payoff by staging a hole-in-one. Subtle. Krilich gives up info in a proffer session. No deal. The proffer agreement

- said that if Krillich ever testifies to the contrary or “presents a position inconsistent with the proffer” of information, the gov’t can use it to impeach, argue at sentencing, and prosecute for perjury.
2. During the *prosecution’s* case-in-chief, defense counsel elicits information through cross that is inconsistent with Krillich’s proffer.
 3. Prosecutor uses the proffered info. Krillich says he did not fulfill the conditions in his waiver b/c he did not present the inconsistent evidence during HIS case.
 4. Procedural Posture: direct appeal from judgment of conviction.
 5. Issue: Did Krillich open the door in the conditional waiver by eliciting evidence inconsistent with his proffer while crossing prosecution witnesses?
 6. Holding: The trial judge could have sensibly concluded that Krillich elicited evidence inconsistent with his proffer. Affirmed.
 7. Reasoning (this is Easterbrook):
 - a. **Market rationale:** For proffer to work, P needs assurance D is being candid. Deceit has to be costly. Thus, paragraph 2(C) strengthens D’s hand in negotiations w/ gov’t by making representations more credible.
 - b. But acknowledges D wants assurance that he can defend at trial, if bargaining collapses.
 - c. **Solution: Can only introduce proffer statement if D elicits “genuinely inconsistent” testimony. Statements are inconsistent only if the truth of one implies the falsity of the other.**
 - d. Evidence is evidence, whether via case-in-chief or cross.
 - e. This comes down to whether defense counsel elicited inconsistent testimony on cross. The trial court determined that he did. This court does not find that determination to be clearly erroneous.
 - f. Testimony that 9th hole is close to clubhouse—meant to imply no one would fake a hole in one there. These statements go beyond casting doubt on P’s evidence – they advance a position inconsistent w/ the proffer.
 - g. Further, D’s conditional waiver of use of proffer agreement was knowing, b/c understood rights relinquished, even if not all of the full repercussions of relinquishing them.
 8. Prof:
 - a. Proffer agreements: Only route to cooperation. P can’t make deal until knows what D has to offer. Solution: agree not to use what's been told unless a deal goes through. UNLESS the defendant gets on the stand and tells a different story; then they can introduce statement as evidence in chief. PLUS: can use proffer statements to get leads.

- b. Concern for Ds: If cooperation falls through, stuck at trial -
- can't put on a good defense. All they can do is say reasonable doubt.
9. Also remember Lauersen: Ethical Rule of Candor: D's lawyer may not present evidence or arguments that contradict the proffer statement. This keeps lawyers FAR from the line!

ii. US v. Duffy, 133 F.Supp.2d 213 (EDNY 2001) – proffer undermines D

1. Rejects “market rationale” of Krillich. Thinks paragraph 2(C) constitutes waiver of D's rights to make a defense and to effective assistance of counsel.
2. Facts: Duffy signed proffer agreement, but no deal. He now wants 2(c) of proffer agreement struck. 2(c) says proffer can be used “as substantive evidence to rebut any evidence offered or elicited, or factual assertions made, by or on behalf of [D] at any stage of a criminal prosecution. . . .”
 - a. Argument: 2(c) is unconscionable. Operates effectively as waiver of trial.
 - b. D does NOT contest gov't using proffer for leads and/or to cross-examine D if he testifies.
3. Procedural Posture: Ruling on defendant's motion to strike paragraph 2(c) from proffer agreement.
4. Issue: does 2(c) implicate the right to put on a defense and the right to assistance of counsel?
5. **Holding: 2(c) burdens the right to a defense/counsel with such impracticality that it cannot stand. Motion granted.**
 - a. Paragraph 2(C) constitutes waiver of D's rights to make a defense and to effective assistance of counsel.
 - b. Only being able to argue reasonable doubt is insufficient. Essentially waiving an effective defense the moment you sign up for proffer.
6. Reasoning
 - a. *Mezzanatto* (Sup Ct) says its ok to make impeachment w/ prior inconsistent statement a condition of the proffer agreement b/c defendant can waive something she is entitled to under rules of evidence.
 - b. But *Mezzanatto* had many concurrences expressing worry about this ruling extending too far. This is a case that goes too far—Duffy isn't just waiving an evidentiary rule. 2(c) implies that he is waiving his right to a defense.
 - c. The only way to know whether Duffy will be “opening the door” is for the judge to preview each question and answer and advise counsel of the consequences of every line of inquiry. This is nuts.
 - d. 2d Circuit construes waivers narrowly and against the gov't, see *Ready*.

- e. This agreement doesn't "level the playing field." It exploits the awesome bargaining power of the gov't, the worry that led to the *Ready* decision.
- f. Rejects market rationale of Krilich. Instead of "strengthening D's hand" in negotiations, equally likely deters cooperation by making price of aborted negotiations too high for D to bear. But either way, the *fundamental* issue isn't whether encourages/deters, but whether deprives of DP.

iii. US v. Velez, 353 F.3d 190 (2d Cir. 2004) – overturns *Duffy*

1. Facts [Same language from *Duffy*, paragraph 2(c), now before the circuit].
 2. Holding: waiver provision is constitutional. *Duffy* overturned.
 3. Reasoning
 - a. *Gomez* from SDNY held opposite of *Duffy*, upheld 2(c).
 - b. *Gomez* is right that fairness dictates enforcement of agreement.
 - c. Invalidating 2(c) will significantly interfere with plea bargaining.
 - d. True, gov't has a ton of power, but *potential* for abuse isn't enough to foreclose negotiation altogether.
 - e. A defendant can still present the inconsistent evidence, she just has to deal with subsequent confrontation w/ her own words.
 4. Prof:
 - a. Client Perjury: Why doesn't *Nix v. Whiteside* end this debate? *Nix v. Whiteside* (U.S.) – lawyer must wash hands of client who wants to commit perjury. If D lawyer was in room at proffer, won't this problem arise at trial? Prof surprised not considered in decisions.
 - b. D lawyer in proffer session has potential conflicts going into trial. Might counsel client not to say certain things, not just b/c of duty of candor, but b/c you'll get hammered w/ statement. OR.....
 - c. RT: Remember Lauersen ethical rule too!
- iv. Velez/Krilich vis-à-vis Duffy:
1. P must be able to evaluate value of D's info at proffer session, so can properly calibrate cooperation deal (if at all).
 - a. If P overestimates, could have Rexach problem.
 2. To the extent we want to ensure D's cooperation meets P's expectations → need Velez/Krilich rule: strong policing of proffer session through harsh penalties for untruth/lack of candor.
 3. If less concerned with Rexach problems, i.e., disparity in expectations about results from cooperation → get Duffy rule, where penalty for lying in proffer can only go so far.

E. SENTENCING DECISIONS

a. ABA Standards

- i. ABA Std 3-4.2 Fulfillment of Plea Discussions;
- ii. ABA Std 3-4.3 Record of Reasons for Nolle Prosequi;
- iii. **ABA Std 3-6.1 Role in Sentencing**

Standard 3-6.1 Role in Sentencing

(a) The prosecutor should not make the severity of sentences the index of his or her effectiveness. To the extent that the prosecutor becomes involved in the sentencing process, he or she should seek to assure that a fair and informed judgment is made on the sentence and to avoid unfair sentence disparities.

(b) Where sentence is fixed by the court without jury participation, the prosecutor should be afforded the opportunity to address the court at sentencing and to offer a sentencing recommendation.

(c) Where sentence is fixed by the jury, the prosecutor should present evidence on the issue within the limits permitted in the jurisdiction, but the prosecutor should avoid introducing evidence bearing on sentence which will prejudice the jury's determination of the issue of guilt.

b. Introduction

- i. All of these cases are from Guidelines era. Not a coincidence.
- ii. The goal of the guidelines was to guarantee uniform sentencing in federal courts, but the effect was to move discretion into the hands of individual prosecutors. Guidelines transferred authority and discretion from judges to prosecutors.
 1. Before: Judge had all the power; broad range; not much P could do besides be persuasive.
 2. After: Judge's discretion cabined to very narrow range. Thus, P's choices, i.e., charging decision, nature of plea, amount of evidence put in at trial or admitted to at plea, became much more consequential. Determined the box that the judge was in.
- iii. Cooperation:
 1. Virtually the only way to escape Guidelines range was to cooperate (otherwise, need departure—very hard). Required motion from government. Could get D out of guidelines range AND statutory minimum.
 2. Before guidelines: Ds couldn't be promised that their cooperation would result in a lower sentence. Ds might just prefer to gamble on judge's leniency.
 3. Under guidelines: Ds are in narrow box UNLESS P gives him break. Ps hold the only key; 5K1.1 motions; spurs cooperation.
- iv. Cooperation Agreements:
 1. D gets coverage for everything he tells about. But must be truthful.
 2. If breach truthfulness provision, P can use everything D told them, and prosecute D for crimes they never would have even known about if he hadn't told them.

- a. Note: Violations are usually for further crimes, rather than not revealing prior crimes.
 - 3. Brechner: If P doesn't like D's info, can tear up agreement. Meaning: D still stuck with guilty plea; but no 5K1.1.
- v. *How* to determine "substantial assistance"? → discretion!
 - 1. Could try to define, e.g., # prosecuted, # of years attained, etc. But agreements usually just leave to discretion of P. Is GF enough?
 - 2. Note: Would never require results, e.g., conviction. B/c then when D testifies against people, jury will hear D only gets break if guy on trial gets convicted. Indicates strong incentive to lie. P wants to say to jury: His only incentive is to tell the truth. Nothing more or less if gets conviction or acquittal. Just to tell truth. Like a perfect machine that channels his self-interest into telling truth.
 - 3. For same reason, Ps won't specify what break D will get. We hold the key. But if D gets anything less than life, it's b/c judge found his testimony truthful.
 - 4. Note: Usually D tells P all he needs to know to get cooperation. After proffer, P just needs D to follow through.
 - 5. Purpose of proffer: Get info to be able to assess its value.
- vi. *Who* determines "substantial assistance"? → P decides!
 - 1. Question: Should we allow judges to second-guess P's decision?
 - 2. If judge gets to override P's judgment re "substantial assistance" based on D's good faith (or whatever), essentially returns to pre-Guidelines scenario. P's pitch is less effective.
 - 3. Makes HUGE difference to P's ability to recruit cooperators. And Ps will be more wary of courts, Ds, making deals.
- vii. P has two choices:
 - 1. Don't write 5K1.1 letter.
 - a. Cooperation Ks are explicit now that sole discretion of P.
 - 2. Write a "warts and all" letter: clarify level of assistance. This gives judge the authority, but indicates shouldn't use it.
 - a. Bullet proof against contract claim. Rexach out of luck.
- viii. These cases don't arise much anymore. Hard to cabin this discretion.

c. **U.S. v. Rexach, 896 F.2d 710 (2d Cir. 1990), p. 654**

i. Facts:

- 1. Rexach reveals info at proffer session. No agreement is reached, but three arrests are made on the basis of the info.
- 2. A week before trial Rexach gets back in touch w prosecutor and offers more info, enters into cooperation agreement requiring "good faith effort to provide substantial assistance" to prosecutor. Rexach had given shitty info and failed to help out at all.
- 3. Prosecution says they are not moving for downward departure b/c Rexach didn't fulfill his end of the agreement. Rexach moves for specific performance, i.e. letter permitting downward departure.

- ii. Issue: whether district ct erred in denying Rexach's motion for specific performance.
- iii. Holding: Evaluation of defendant's effort lies w/in discretion of the prosecutor, and can only be reviewed for misconduct/bad faith. Affirmed.
- iv. Reasoning:
 - 1. Uses contract law principles. If satisfaction is condition, OK when obligor is "honestly, even though unreasonably, dissatisfied."
 - 2. While prosecution's discretion is not unfettered, there is no danger of abuse here b/c of institutional incentives for prosecutors to play fair.
- v. Dissent:
 - 1. Disagrees w/ P's discretionary call. Info led to 3 arrests. Should count as substantial assistance.
 - 2. Disagrees about K law principles. In K law, standard is whether reasonable person would be satisfied. If not objectively reasonable, D should get relief.
- vi. Prof:
 - 1. This case clearly resulted from miscommunication – P thought D would be more valuable than he ended up being, offered too good a cooperation agreement. (How much we want to police D's candor in proffer sessions goes back to Krilich/Velez/Duffy).
 - 2. What relief would D have gotten anyway? Re-sentencing + specific performance. P would write warts and all letter. Sentence would be the same.
 - 3. Absent unconstitutional motive, no real relief possible here. Courts not apt to wade into policing P discretion here.

d. **U.S. v. Brechner, 99 F.3d 96 (2d Cir. 1996), (Supp.)**

- i. Facts
 - 1. Brechner is charged with tax evasion and makes a deal for § 5K1.1 downward departure motion if he provides substantial assistance to gov't and otherwise complies with the agreement.
 - 2. Brechner goes to great lengths to help the gov't (wears a wire, meets w/ bank officers for months) but lies to P about receiving kickbacks in one debriefing session (though quickly corrected, and no detrimental reliance).
 - a. P says will give D a "fresh start."
 - 3. AUSA declines to move for downward departure at sentencing based on D's lies.
 - a. D has dissipated his value as a witness. Even if response was harsh, it was reasonable. D's lie undermines P's pitch to jury. Claim that incentives are perfect such that whatever comes out of mouth is the truth. But incentives didn't work to produce truthful witness at debriefing session. So P can't use as witness.

- b. Some Ps probably don't disclose to jury. Theory: Takes time for these criminals to come clean.
 - c. 2nd Cir: P absolutely must disclose this statement—b/c impeaches credibility of witness.
 - d. Another option: Lose last deal, but get new deal if plead to another thing. Disclose whole thing to jury. Still makes for a weak witness.
 - 4. Brechner moves for specific performance: my little lie was inconsequential. It's BF not to give me 5K1 motion.
 - 5. Trial judge agreed BF. Gave departure as if he had the authority (didn't require specific performance of the letter).
 - ii. Procedural posture: P appeals sentence, which departed from guidelines.
 - iii. Issue: Was Gov't refusal to move for downward departure justified?
 - iv. Holding: D's lie violated the agreement. Sentence vacated and remanded for resentencing.
 - 1. Note: On resentencing, judge gave exactly same sentence—just found a different reason. P was litigating on *principle*.
 - v. Reasoning
 - 1. It is true that the gov'ts discretion is not unfettered; however, the review of gov't performance is to see if they have lived up to their end of the bargain (*Knights*) or acted fairly and in good faith (*Resto*).
 - 2. Agreement required that Brechner "cooperated fully, provided substantial assistance to law enforcement authorities, and otherwise complied with the terms of this agreement" which included "truthful, complete, and accurate information." He failed to meet this requirement.
 - 3. The district ct found that the breach was not material b/c it was trivial and quickly corrected. However, the breach undermined his credibility as a witness, so it was material to his value to the gov't.
 - 4. Plus, the agreement specifically said that lies will void the bargain.
 - vi. Prof:
 - 1. **Ps got the rule they needed: When we are unhappy, we get to tear up the agreement. Otherwise, too hard to get cooperation testimony that we can sell to a jury.**
 - 2. Again, see reluctance by court to police. D dissipated his own value as a witness. Even if response was harsh, it was reasonable. No evidence of invidious classification – no relief.
- e. Death Penalty
 - i. Death penalty combines the charging decision and sentencing question. Questions of Ps policing themselves.
 - ii. **Lori Montgomery, *Eliminating Questions of Life or Death*, W. Post, 20 May 2002.**
 - 1. MD prosecutor mandates every single person eligible for capital punishment get charged with capital crime. Let the jury decide.
 - 2. Attacks discretion problem by trying to eliminate it.

3. Results in an extraordinary amount of death penalties and still disproportionate number of black death row inmates.
- iii. Critique:
1. This doesn't solve the discretion problem, it just buries it further back in the process. Masks the problem. Still discretionary decisions to be made. The DA has to decide whether to charge murder at all before she evaluates the possibility of charging capital murder. She just exercises her discretion at a different point in the decisionmaking process.
 2. Obvious slippery slope problem here—why give prosecutors discretion to decline any prosecution at all? Can answer this by saying death is different (finality) or that jury has a say in capital sentencing, so in capital cases you're not abandoning discretion but pushing it onto the jury.
 3. Totally at odds with where prosecutors are otherwise pushing, asking for more and more discretion. Current issue in the DOJ of who will get the death decision (at what level).
- iv. AG's Office
1. Tries to eliminate geographical disparity in death penalty by taking discretion to seek death penalty away from AUSAs and lodging it with AG.
 2. Worry: Still can't eliminate geographical disparity of the jury that decides! If jury is supposed to embody standards of community, maybe correct to have differences across juries/communities.
 3. Is it right to force NY prosecutors to seek death, just b/c TX does? See Gleeson article.

XII. CONFLICTS OF INTERESTS (DUTY OF LOYALTY)

A. INTRODUCTION AND FRAMEWORK

- a. Conflicts of interest are about competing interests of equals.
 - i. Unlike other parts of class, which examine when certain interests trump interest of loyalty to client.
 - ii. This is question of one client vs. another client.
 - iii. Or lawyer's self interest v. client – remember, if lawyer's interest is defensive (e.g., trying to protect herself) → trumps (confidentiality rule). But what if lawyer has affirmative personal stake in it?
- b. This unit is less about the role of the lawyer and the practice of law and more about how we fit our conception of the lawyer into the constitutional framework.
- c. Questions mostly arise on the D side.
- d. Pre-trial vs. Post-trial determinations are very different; but standards interlocked.
 - i. Standard of review vs. breadth of trial judge's discretion.
 - ii. The more strictly/readily you overturn a conviction (post-trial), the more leeway must give judge to exercise discretion (pre-trial).

- iii. Note: “adverse effect” standard is much more lax than a prejudice standard. Need only show an alternative defense strategy that wasn’t pursued.

B. FRAMEWORK FOR ANALYSIS

a. Pre-Trial Conflict Determination

i. Judge can disqualify based on actual OR potential conflicts.

1. Potential Conflicts

- a. Rule: District Court must recognize presumption in favor of D’s counsel of choice, but that presumption may be overcome not only by a demonstration of actual conflict, but by a showing of serious potential for conflict. Wheat.
- b. Potential conflicts “impermissibly imperil right to fair trial.” Cuyler. I.e., harm could come down the road.
- c. Judge must evaluate through dark murky glass of pre-trial contexts, b/f interests have diverged. Wheat.
- d. Judge need not address sua sponte. See Cuyler. But if raised as objection (by P or D) judge permitted to dismiss counsel based on mere potential conflict.

2. Actual Conflicts – of course judge can dismiss for actual conflicts, absent waiver; will be more rare. E.g., Reckmeyer, if had raised.

- a. Actual conflict = lawyer’s interests are such that it is reasonable to believe that he/she would be tempted to act in manner inimical to client’s best interests. See Reckmeyer.

3. Deference to Trial Judge: Huge deference to trial judge in making this decision. Wheat.

- a. System prefers to err on the side of erroneous separation, to avoid re-trial based on conflict.
- b. But inverse concern: could require re-trial based on Gonzalez-Lopez, deprivation of counsel of choice.

4. Examples of conflicts:

- a. Multiple representation (two Ds in same case/matter). E.g., Wheat, Cuyler, Rahman, Schwartz.
- b. Personal stake (e.g., Dowd in Reckmeyer) → unwaivable if wrapped up in client’s criminality, per Fulton. Contra Reckmeyer.
- c. Abandoning advocate’s role (e.g., Montana v. Jones) → results in per se prejudice on appeal! (doctrinally aberrant).
- d. When lawyer acts as witness (especially an “unsworn” witness). E.g., Nunn, Janes, Locascio.

5. Example of non-conflicts:

- a. P’s having personal stake in prosecution. Dick v. Scroggy.

ii. Waiver:

- 1. D’s waiver of conflict-free counsel must be knowing.
- 2. It is Judge’s responsibility to ensure knowing waiver.

- a. Judge will hold *Curcio* hearing:
 - i. **Appoint alternate counsel to explain risks.**
 - ii. **D must explain in his own words** what the conflict means and the possible risks. E.g., Rahman, Schwartz.
 - iii. Then judge must decide if conflict is **waivable**.
- b. If Judge doesn't hold hearing and conflict arises → almost per se reversal.

3. Unwaivable conflicts:

- a. If lawyer himself is bound up in client's criminal enterprise. Fulton (2d Cir.) (But see Reckmeyer.)
- b. Schwartz (2d Cir.) – if no rational D would forgo that alternate defense theory. (Prof thinks troubling.)
- c. If co-Ds represented by same lawyer have not yet finalized their dispositions. E.g., Wheat. (not abuse of discretion).
- d. When lawyer acts as “unsworn witness.” E.g., Locascio.

4. Judge's dilemma:

- a. If refuse waiver, remove counsel, then D loses → D will claim Wheat and Gonzalez-Lopez on appeal (entitled to lawyer of choice).
- b. If allow waiver, keeps counsel, then D loses → D will claim conflict was unwaivable, judge should not have accepted waiver. E.g., Schwartz, Reckmeyer.

b. Post-Trial Conflict Determination

- i. Potential Conflicts are off the table – if never burgeoned into actual conflict, clearly no harm (would not meet Strickland).
- ii. **Actual Conflicts – only warrants relief if ADVERSE EFFECT**
 - 1. More lax than prejudice – prejudice undermines confidence in the outcome. Why not require prejudice? No way to know how it would have turned out. Hard to administer.
- iii. “**Adverse effect**” = plausible alternative that wasn't pursued because of the conflict. Proof judgment/loyalty impaired (actual lapse in representation). Cuyler. Three main elements:
 - 1. Must be **ALTERNATIVE** strategy; and
 - a. E.g., putting on defense, in Cuyler. E.g., cross-examining P's witness & objecting to evidence in Glasser.
 - 2. Must be **PLAUSIBLE** (i.e., reasonable atty would have done it).
 - 3. Plus **CAUSATION**. Lawyer didn't pursue alternative strategy **BECAUSE OF** the conflict. (Not necessarily *only* because.)
 - a. Can prove causation either **DIRECTLY** or **INHERENTLY**.
 - i. Directly – “Yes, I didn't pursue vigorous cross b/c he is my other client.” Lawyer not pursuing strong cross-examination in first client's trial vs. in second client's trial – not inherent. Must show direct. E.g., Cuyler, so long as other Ws not called were not the co-Ds (in which case, 5A privilege blocked).

- ii. Inherently. E.g., Reckmeyer – going to trial would inevitably imperil Dowd. Would put pressure on him to advise Reckmeyer to plea. This is “inherent.” (Note: Court doesn’t walk through analysis. Probably thinks implied.)
 - iv. If conflict was waived, then no relief, unless conflict was **unwaivable**. E.g., Reckmeyer.
 - v. Only if satisfy these elements, will you get relief, i.e., new sentencing.
- c. **Disqualification of Defense Counsel:**
 - i. **Huge deference to Trial Judge’s decision to disqualify.** Wheat.
 - 1. Amounts to “abuse of discretion” standard. See Wheat dissent.
 - 2. Must view facts as they appeared to judge ex ante: through dark murky glass of pre-trial contexts, b/f interests have diverged. Wheat.
 - 3. System prefers to err on the side of erroneous separation, to avoid re-trial based on conflict.
 - 4. Court has independent interest in ensuring confidence of its results, regardless of D’s willingness to waive right.
 - 5. 6A right to counsel is *functional*. Wheat (but see Wheat dissent: should be less deferential, b/c right is about autonomy).
 - 6. Only example of erroneous deprivation: Rodriguez: P could not show *any* admissible evidence W could have provided against D.
 - ii. **Relief:** If you can show trial judge’s decision amounted to abuse of discretion, get automatic retrial. Gonzalez-Lopez.
 - 1. If pre-trial separation **erroneously deprives you of hired counsel of choice** results in automatic re-trial (presume deficient performance AND prejudice).
 - 2. Too hard to tease out what you lose by having competent counsel who wasn’t of your choosing. Gonzalez-Lopez.
 - 3. Overruled Rodriguez’s “adverse effect” standard.

C. MULTIPLE REPRESENTATION

a. Ethical Limits: MR 1.7; ABA 4-3.5

i. Model Rule 1.7 – Conflict of Interest

- 1. Simple: Can’t represent someone if there is a conflict, unless the conflict is waivable and waived.
- 2. Upshot: Presence of a conflict is not end of the story. If waivable and waived, can stay in. Which are waivable?

Rule 1.7 Conflict Of Interest: Current Clients

(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:

- (1) the representation of one client will be directly adverse to another client; or
- (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) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a

lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (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
- (4) each affected client gives informed consent, confirmed in writing.

ii. ABA Standard 4-3.5 – Conflicts of Interest

1. Essentially the same as Model Rule 1.7. Avoid concurrent representation of more than one client in same case, if interests may conflict. 4-3.5(c). But allows for possibility of joint representation.
2. Exception: Except for preliminary matters like bail.
 - a. This is for practicality. But sometimes things can still go wrong, even at bail hearing!

Standard 4-3.5 Conflicts of Interest

(a) Defense counsel should not permit his or her professional judgment or obligations to be affected by his or her own political, financial, business, property, or personal interests.

(b) Defense counsel should disclose to the defendant at the earliest feasible opportunity any interest in or connection with the case or any other matter that might be relevant to the defendant's selection of counsel to represent him or her or counsel's continuing representation. Such disclosure should include communication of information reasonably sufficient to permit the client to appreciate the significance of any conflict or potential conflict of interest.

(c) Except for preliminary matters such as initial hearings or applications for bail, defense counsel who are associated in practice should not undertake to defend more than one defendant in the same criminal case if the duty to one of the defendants may conflict with the duty to another. The potential for conflict of interest in representing multiple defendants is so grave that ordinarily defense counsel should decline to act for more than one of several codefendants except in unusual situations when, after careful investigation, it is clear either that no conflict is likely to develop at trial, sentencing, or at any other time in the proceeding or that common representation will be advantageous to each of the codefendants represented and, in either case, that:

- (i) the several defendants give an informed consent to such multiple representation; and
- (ii) the consent of the defendants is made a matter of judicial record. In determining the presence of consent by the defendants, the trial judge should make appropriate inquiries respecting actual or potential conflicts of interest of counsel and whether the defendants fully comprehend the difficulties that defense counsel sometimes encounters in defending multiple clients.

(d) Defense counsel who has formerly represented a defendant should not thereafter use information related to the former representation to the disadvantage of the former client unless the information has become generally known or the ethical obligation of confidentiality otherwise does not apply.

(e) In accepting payment of fees by one person for the defense of another, defense counsel should be careful to determine that he or she will not be confronted with a conflict of loyalty

since defense counsel's entire loyalty is due the accused. Defense counsel should not accept such compensation unless:

- (i) the accused consents after disclosure;
- (ii) there is no interference with defense counsel's independence of professional judgment or with the client-lawyer relationship; and
- (iii) information relating to the representation of the accused is protected from disclosure as required by defense counsel's ethical obligation of confidentiality.

Defense counsel should not permit a person who recommends, employs, or pays defense counsel to render legal services for another to direct or regulate counsel's professional judgment in rendering such legal services.

(f) Defense counsel should not defend a criminal case in which counsel's partner or other professional associate is or has been the prosecutor in the same case.

(g) Defense counsel should not represent a criminal defendant in a jurisdiction in which he or she is also a prosecutor.

(h) Defense counsel who formerly participated personally and substantially in the prosecution of a defendant should not thereafter represent any person in the same or a substantially related matter. Defense counsel who was formerly a prosecutor should not use confidential information about a person acquired when defense counsel was a prosecutor in the representation of a client whose interests are adverse to that person in a matter.

(i) Defense counsel who is related to a prosecutor as parent, child, sibling or spouse should not represent a client in a criminal matter where defense counsel knows the government is represented in the matter by such a prosecutor. Nor should defense counsel who has a significant personal or financial relationship with a prosecutor represent a client in a criminal matter where defense counsel knows the government is represented in the matter by such prosecutor, except upon consent by the client after consultation regarding the relationship.

(j) Defense counsel should not act as surety on a bond either for the accused represented by counsel or for any other accused in the same or a related case.

(k) Except as law may otherwise expressly permit, defense counsel should not negotiate to employ any person who is significantly involved as an attorney or employee of the government in a matter in which defense counsel is participating personally and substantially.

b. Constitutional Limits: Cuyler v. Sullivan (U.S. 1980), p. 663

i. Facts

1. Execution-style murder of union official and his girlfriend. 3 Ds charged w/ murder; to be tried separately.
2. P's key witness is janitor in union headquarters. Saw all 3 Ds come in, heard "firecrackers," one of Ds told him to get lost. Bodies found next morning.
3. All 3 Ds have same 2 private lawyers in separate trials. Sullivan tried first. Evidence against Sullivan was entirely circumstantial and defense rested w/o presenting any evidence. Sullivan was sentenced to life. Other 2 Ds acquitted. No one ever objected to the multiple representation.
4. The two lawyers give conflicting accounts of their roles in Sullivan's trial and the strategic decisions they made.

- a. One lawyer says they didn't call witnesses b/c didn't want to expose the witnesses for the other 2 trials coming up.
 - 5. One of the other defendants says he would have testified for Sullivan to rebut the prosecution witness's testimony.
- ii. Procedural Posture
 - 1. Sullivan's post-trial motions failed and PA Sup. Ct. affirmed his conviction. Sullivan is denied collateral relief in PA postconviction proceedings. Deleted from our version, but he is appealing denial of federal habeas (based on 6A IAC claim).
- iii. Issue: Whether D denied 6A IAC, even though never raised objection, and can't determine whether prejudiced his trial.
- iv. Holding: Must establish actual conflict of interest. Remanded.
 - 1. No affirmative duty on trial court to inquire into propriety of multiple representation. *Holloway* requires that state courts investigate timely objections to multiple representation, but not that the court investigate sua sponte.
 - 2. If D objects pre-trial, must show potential conflicts "impermissibly imperil right to fair trial."**
 - 3. On appeal, D must show "ACTUAL conflict of interest that adversely affected his lawyer's performance,"** i.e., proof judgment/loyalty impaired (actual lapse in representation).
 - 4. Example of actual conflict: E.g., Glasser: D failed to cross-examine W whose testimony linked D w/ the crime and failed to resist the presentation of arguably inadmissible evidence. Both omission resulted from desire to diminish jury's perception of co-D's guilty. Reversal.
 - 5. Example of no conflict: Dukes: D pled guilty, then D's lawyer sought leniency for co-D by arguing his cooperation induced D's guilty plea. No conflict, b/c D could not ID any actual lapse in representation.
- v. Brennan (concurrence in result):
 - 1. Trial court must affirmatively inquire b/c can't rely on atty to raise. B/c no knowing waiver here, would make rebuttable presumption of IAC.
- vi. Marshall (partial concurrence/dissent):
 - 1. Worry here is so grave that trial court does have a duty to inquire into informed consent. Plus adverse effect std is too harsh and defendants should only have to show an actual conflict for relief. Such was the decision in *Holloway* (no need to show adverse effect).
- vii. Prof:
 - 1. These lawyers were probably mob lawyers sent to make sure the defendants don't flip and say who sent them. Powell blows it by only focusing on the 3Ds.

2. Court says not putting on a defense could be b/c of lawyer's advice, or D's fear of exposing extra-marital affair. Ha. This is murder charge. Not worried about affair.
3. Who were the witnesses not called?
 - a. The other two Ds? If so, non-issue—they will take 5th, and no lawyer could get them to testify.
 - b. But if other Ws, then this is the essence of an ACTUAL conflict. Something that might have helped Client A, foregone b/c of loyalties to Client B or C.
4. Question: Must conflict be the sole reason for choice, or just a reason? If want lawyer to represent interest, want to know what lawyer w/o conflict would have done. If it was the co-Ds, then the privilege, not the conflict, kept them off. But if it was other Ws, then it was the conflict.

c. Waiver and Consent

i. U.S. v. Rahman, 837 F.Supp.64 (SDNY 1993), p. 669

1. Facts:
 - a. Terrorism case. Gov't adds indictment against the Sheik, Rahman. D atty Kunstler is already representing 2 Ds, previously represented another, now doing Rahman.
 - b. Trial judge holds *Curcio* hearing.
 - i. Judge must be creative in elaborating every possible scenario where could go wrong. Wants to avoid re-trial. Possible problems:
 1. Conflicting arguments
 2. Plead + Cooperate (privilege problems, advice)
 - ii. Only looking at potential conflicts- don't yet know whether interests will diverge. Evaluating through dark glass- murky pre-trial area.
 - iii. Dilemma: longer judge waits to decide, greater chance of prejudice of being deprived of lawyer of choice later in process.
 - c. D atty stands totally mute. Says no conflict b/c innocent.
 - i. Note: In D's interest to go forward w/ shared counsel; if something goes wrong, can always claim unwaiveable on appeal.
 - d. Rahman does not give knowing waiver.
 - i. Cannot/will not express in his own words what might go wrong. Just says no conflict b/c all innocent.
 - ii. Rehearsed, non-responsive answers suggest doesn't understand.

2. Procedural Posture: gov't motion to prohibit multiple representation.
 - a. Note: usually Ps raise to preserve conviction. But sometimes b/c want to remove good lawyer.
3. Issue: can the court deny defendant's choice of counsel b/c defendant's consent appears to be uninformed?
4. Holding: Rahman must be separately represented from other 2 Ds; Lawyers must choose between them.
 - a. Note: Does not reach issue of unwaivable conflicts, b/c here not even waived.
5. Reasoning
 - a. *Wheat*: generally entitled to lawyer of choice (unless conflict not waived or unwaivable); district court denies choice of counsel despite willingness of defendant. Due in part to difficulty to predict actual conflicts, difficult to get entire truth from one's own client, one tiny piece of evidence that is now unknown may surface and create an actual conflict.
 - b. Presumption in favor of defendant's choice of counsel can be overcome by showing of serious potential for conflict.
 - c. Record convinces the judge. While the other two defendants do appear to understand, Rahman doesn't seem to get it.
6. Prof:
 - a. Our system tries to avoid needless re-trials. Willing to (sometimes needlessly) separate D from lawyer to avoid retrial.
 - b. Gives judges lots of deference to make this decision. Wheat

ii. **US v. Schwarz, 283 F.3d 76 (2d Cir. 2002), p. 695**

1. Facts
 - a. NYPD officers beat/assaulted Haitian immigrant. One cop sodomized w/ broken broomstick in bathroom.
 - b. All 3 Ds represented by same lawyers, who also have \$10 million from PBA (police officers union). PBA was defendant in civil trial alleging systemic abuse in dept.
 - c. Judge conducts best Curcio hearing ever. Schwartz gives detailed description of possible conflicts/risks in his own words.
 - i. Note: Nothing else judge could have done! If he required separation, D would certainly have raised a Gonzalez-Lopez appeal.
 - d. Volpe pleads guilty halfway into trial. Says there was second officer in bathroom, but not Schwartz. Jury hears only the "second officer" party through the press.

- e. Swartz's only defense: there was only one officer in bathroom. Doesn't point finger at other cop. Convicted.
2. Procedural Posture: Direct appeal from conviction.
3. [Dispositive] Issue: Was this an unwaivable conflict?
4. Holding: This was an actual conflict that adversely affected counsel's performance and that conflict was unwaivable.
5. Reasoning
 - a. "Plausible alternative defense strategy": shunting blame onto other officer.
 - b. Causation: Lawyers couldn't pursue, b/c PBA wants to cast Volpe as single bad apple for civil lawsuit.
 - c. Unwaivable: No rational D would forgo that alternate defense strategy. (→ this is unusual rule!)
6. Analysis:
 - a. This case is outlier, relative to caselaw. 2d Cir just thought D was actually innocent.
 - b. Obviously a conflict. But unwaivable? 2d Cir says yes, but rule is troubling. Says conflict is unwaivable b/c no rational D would forego that alternate defense strategy. But absent conflict, D would be free to forego that strategy!
 - c. Analogy to Masat (crazy defense)—not IAC to accede to client's crazy wishes. Only IAC if refuse to follow D's wishes on the three things on which client reigns supreme. This strategy seems like it should be on the table for D.
 - d. Compare w/ Reckmeyer. There, D waived by his inaction before pleading guilty. Here, even the best waiver doesn't work!

D. OTHER CONCURRENT CONFLICTS

a. Reckmeyer v. US, 709 F.Supp. 680 (E.D.VA 1989), p. 677

i. Facts

1. D involved in drug conspiracy. Retains Dowd for \$100K when learns of GJ investigation. Dowd keeps demanding huge payments. D feels "locked in" and agrees. D runs out of legit funds; Dowd demands the drug money. Threatens to withdraw from case twice. D must smuggle drug money in from Bahamas using brother. 24-count indictment against D includes the drug trip to Bahamas to get \$ for Dowd.
2. Dowd files a motion to dismiss the charges and, before a hearing on the motion, insists Reckmeyer pay another \$200K for the hearing and another \$200K for trial.
3. Plea bargaining results in agreement to take a polygraph to prove Reckmeyer isn't hiding assets. Dowd instructs Reckmeyer not to reveal anything about the illegal payments, but hounds him in front of the gov't during both polys asking where the hidden assets are.

4. Reckmeyer pleads guilty.
5. Finally, Reckmeyer goes to AUSA and discloses all this BS.
- ii. Procedural posture: § 2225 Habeas Petition to Vacate Sentence
- iii. Issue: if true, do Reckmeyer's allegations state a claim for relief (IAC)?
- iv. Holding: Habeas petition denied. Conflict is waiveable, and can be waived through inaction.
- v. Reasoning:
 1. **Dowd had an actual conflict of interest.**
 - a. If lawyer is wrapped up in client's criminal conduct → this is actual conflict. And per Fulton, 2d Cir (mentioned in Schwartz), this conflict is unwaivable (if had arisen pre-trial).
 2. **There was an adverse effect.**
 - a. Adverse effect = pled guilty; didn't get trial.
 - b. Causation = Dowd had clear personal interest in avoiding trial to keep his improprieties hidden. Don't know if this influenced his advice, but it's enough.
 3. **But D waived his right. Therefore no relief.**
 - a. This result seems contrary to Fulton, which says lawyer bound up in client's illegalities is unwaivable.
 - b. Plus, no Curcio hearing, no investigation into whether D really knew what he was giving up. Court just says he must have known. Knew payments to Dowd were illegal b/c tried to conceal. Always had ability to fire Dowd.
 - c. Realpolitik: Court thought D was gaming system. Reluctance to give relief. But doctrinally, cannot reconcile w/ e.g., Schwartz.

b. **Montana v. Jones, 923 P.2d 560 (Montana 1996), p. 685**

- i. Facts: 2 days before trial, D's lawyer Halvorson moves to withdraw b/c says D admitted guilt; found decision to reject plea repugnant; reveals client confidences, etc. Judge denies motion (stupid! Should have let him withdraw!). Halvorson tried the case on behalf of Jones. Convicted.
- ii. Procedural Posture: Direct appeal from trial.
- iii. Issue: did the District Court abuse its discretion in denying Halvorson's motion?
- iv. Holding: Yes. Reversed and remanded for new trial.
- v. Reasoning:
 1. **Court abandons analytical framework. Finds "presumption of prejudice" and grants new trial.**
 2. Assistance must be effective, must have undivided loyalty.
 3. The record indicates only an alleged intent to commit perjury. Halvorson didn't just tell Jones why he shouldn't lie and tell Jones that if he lied Halvorson would have to tell the court (as in *Nix*), Halvorson took it upon himself to go to the court and disclose confidential information.

4. Halvorson abandoned his loyalty to Jones by revealing confidences and abandoned his adversarial role, calling Jones's desire to go to trial repugnant.
 5. *Frazer* establishes the possibility of facts that render an attorney/client relationship so defective that a presumption of prejudice is appropriate. Court uses *Frazer* here and remands for new trial.
- vi. Analysis:
1. Actual conflict? This is not an actual conflict. "I think my client is guilty" is not what we think of as a conflict.
 2. Potential conflict = might do something to harm down the road.
 3. Doctrinally, to award post-trial relief, need to show foregone alternative defense strategy. Even if breakdown of lawyer-client trust is inherent conflict, must show adverse effect, e.g., I would have taken the stand but didn't trust atty.
 4. Shows court is uncomfortable w/ framework when case just strikes it as WRONG. Presumed IAC w/o evaluating actuality of conflict or prejudice/adverse effect.

E. DISQUALIFICATION OF DEFENSE COUNSEL

- a. Intro:
- i. Pretrial disqualifications will necessarily be broader than post-trial determinations. Pretrial, we're weeding out potential AND actual conflicts. After the fact, we only weed out actual conflicts that ALSO had an adverse effect. More deference to trial judge's determination pre-trial.
- b. **Wheat v. United States, 486 U.S. 153 (1988), p. 725**
- i. Facts
 1. Wheat is charged in a huge conspiracy with multiple other defendants. Represented by attorney Iredale who also represented two of the other defendants, both of whom plead guilty. Gov't claims conflicts. Court schedules hearing for day b/f D's trial.
 - a. Gomez-Barajas – acquitted for drug conspiracy. Negotiated plea deal for tax evasion. Deal not yet accepted.
 - i. Alleged potential conflict: If plea rejected, goes to trial, then D might have to testify. B.S.
 - b. Bravo – has already pled guilty AND been accepted.
 - i. Alleged potential conflict: P might call Bravo as witness at D's trial. Then lawyer will be conflicted, won't be able to cross. (B.S. – even the unconflicted lawyer doesn't end up crossing Bravo.)
 2. D claims these potential conflicts are weak, very speculative. Plus, all three willing to waive. Gov't just doesn't want D to have good atty that got such good deals for the other 2 Ds.

- a. If question is cross, can always have another atty do that.
 - 3. Court ruled that it had no choice but to find an unwaivable conflict.
 - 4. Wheat is convicted and 9th Circuit affirms.
- ii. Procedural Posture: on appeal from 9th Circuit affirming convictions.
- iii. Issue: did the district court err in declining Wheat's waiver of right to conflict-free counsel and refusing to allow Iredale to represent him?
- iv. Holding: district court's refusal to accept the waiver was within its discretion and did not violate Wheat's 6th am. rights, since there was "serious potential for conflict."
- v. **Rule: District Court must recognize presumption in favor of D's counsel of choice, but that presumption may be overcome not only by a demonstration of actual conflict, but by a showing of serious potential for conflict. Plus, large deference to trial court.**
- vi. Reasoning:
 - 1. The right to counsel of one's choice is already circumscribed in many ways.
 - 2. D's interest might be taken care of by waiver. But courts have independent interest in fair trial by conflict-free counsel. Glasser.
 - 3. Trial court faces being "whip-sawed" no matter how they rule on a potential conflict. In bind: If allow, possible conflict. If deny, lose counsel of choice. Must give "substantial latitude" to court on *one* side of this dilemma. *Dolan*: court can surely decline a waiver when there is an actual conflict.
 - 4. Pre-trial determination is hard. Requires deference.
 - a. It is almost impossible to predict when potential conflicts will burgeon into actual conflicts, so trial courts should have discretion to deny waiver when serious potential conflict exists to ensure a fair trial.
 - b. "A district court must pass on the issue whether or not to allow a waiver of conflict of interest by a criminal defendant not with the wisdom of hindsight after the trial has taken place, but in the murkier pre-trial context when relationships are seen through a glass, darkly."
- vii. Dissent (Brennan & Marshall):
 - 1. Agrees w/ majority that 6A right to counsel does not create absolute right to counsel of choice. I.e., voluntary waiver is not the end of the story.
 - 2. Worried about deference. Goes back to conception of 6A right.
 - a. If functional, just want effectiveness → majority rule.
 - b. If autonomy, viewed as extension of client → need less deference in decision to separate lawyer from client. Need more confidence something will really go wrong.
 - i. Dissent thinks conflict must be likely & serious to overcome presumption.
 - ii. Majority appears to adopt "abuse of discretion" std.

- iii. But *Cuylar* gave no deference at all. No significant difference b/w determining whether there was actual conflict, post-trial, vs. whether judge properly disqualified based on potential conflict, viewed pre-trial.
 - 3. Also worried about P's abuse (dreaming up speculative conflicts).
 - viii. Analysis:
 - 1. Case tells us two important things:
 - a. Conception of 6A right to counsel is functional.
 - b. Large deference at front-end to avoid retrials at back end.
 - 2. Defer to trial judge if he chooses to disqualify based on potential conflict.
 - a. This is the safe harbor of the two whip-saw options. Denying choice of counsel (more deference) vs. allowing conflicted counsel.
 - 3. Based on court's independent interest in ensuring confidence.
 - a. Not just about D's knowing, voluntary waiver.
 - b. Also court gets its own say, independent of D's choice.
 - ix. Fischetti:
 - 1. notes that gov't was actually hurting their case by making this motion—they would want Iredale to go easy on his former client when he was crossed. But gov't wants to foreclose any grounds for appeal.
 - 2. Always disclose potential conflicts to the court even if client OKs them. Be ready for your client to turn on you.
- c. Rodriguez v. Chandler, 382 F.3d 670 (7th Cir. 2004), p. 732
 - i. Facts
 - 1. D's hired lawyer represented detective (potential W for P) in unrelated real estate deal; P claimed (w/o support) that W was "integral part of case" against D, creating per se conflict of interest. Implication: D's lawyer would treat w/ "kid gloves on cross" to avoid losing paying client. P's assurance belied by fact that W did not testify, and P could not show *any* admissible evidence W could have provided against D. Trial court required D to prove that W was certain *not* to testify for P. Effectively shifted burden to D. Refused to accept D's waiver b/c found actual conflict. But burden is on P to show ostensible conflict. P never calls W. Rodriguez is convicted.
 - ii. Procedural posture
 - 1. On direct appeal, appellate court finds that the trial court was in danger of being whip-sawed as discussed in *Wheat* and that the judge didn't err.
 - 2. Rodriguez files habeas with district court; they find that appellate court was mistaken since gov't hadn't overcome the presumption in favor of Rodriguez's counsel, since detective didn't have

material evidence against Rodriguez. District court issued the writ and Illinois appeals here.

- iii. Issue: Is Rodriguez entitled to a new trial since the gov't failed to overcome the presumption in favor of her counsel of choice?
- iv. Holding: Rodriguez must demonstrate that she suffered adverse effect.
- v. Reasoning
 - 1. Disqualification was erroneous:
 - a. Burden of proof in demonstrating potential conflict is on P in pre-trial context. Wrong to shift to D.
 - b. Disqualification of counsel was unreasonable here, b/c even viewing info known ex ante, no possible conflict.
 - c. No requirement of BF by gov't to find improper.
 - 2. What effect must D prove to be entitled to re-trial?
 - a. Auto reversal is too extreme—after all, Strickland requires showing *prejudice* if denied competent atty. Being denied counsel of choice is not as bad as being denied competent atty altogether.
 - b. But true prejudice is too hard to show in this context—there may be hard-to-uncover shortcomings.
 - c. Middle ground: Court settles on “adverse effect” (same standard as conflicted counsel). Must be enough to show representation suffered setback, even if doesn't reach level of undermining confidence in outcome (i.e., prejudice).

d. U.S. v. Gonzalez-Lopez (U.S. 2006), p. 735

- i. Overrules Rodriguez. Adopts automatic reversal rule instead.
- ii. If erroneously deprived of counsel of choice, results in automatic retrial.
 - 1. Presume deficient performance AND prejudice.
- iii. Scalia says don't just want competent lawyer – you want the lawyer who will win!
 - 1. Impossible to figure out what you lose by having competent counsel who's not your counsel of choice.
 - 2. Much more solicitous view than Strickland. People who retain counsel get more relief than those w/ appointed counsel.

F. ADVOCATE-WITNESS RULE

- a. Intro
 - i. When D's own lawyer testifies as witness, problems arise. But is it always a conflict? Not always.
 - ii. When lawyer acts as “unsworn witness” → problem. E.g., Locascio.
 - 1. Cannot waive. Taints adversary system b/c jury credits lawyer's vouching b/c assume he knows b/c actually involved. But can't cross, b/c not a true witness. Lawyer is overtly an advocate, but covertly also acting as witness.
 - iii. When lawyer acts a sworn witness → not really a problem for adversarial system. Jury gets to decide whether to believe.

1. Cases require withdrawal, on pain of reversal! E.g., *Janes*, *Nunn*. Only justifiable on professional courtesy rationale; not about protecting adversarial system.
 2. Except if lawyer continues to add facts during summation (e.g., *Janes*), jury might get confused trying to determine what is evidence vs. advocacy.
- iv. Lesson: If you think what's happening might be subject of proof at trial, have someone else there who could testify!!

b. **Nunn v. State, 778 S.W.2d 707 (E.D.MO 1989), p. 741**

i. Facts

1. D's lawyer secretly records telephone conversations w/ witnesses without their knowledge. Also subpoenas a prosecution witness for deposition w/o notifying the court or P, only to have her show up and then not depose her.
2. When the witness is called at trial, she denies being subpoenaed. Defense counsel calls himself to the stand to refute her testimony.
3. Prosecutor has a field day on cross and in closing talking about how unethical and unprofessional defense counsel had been.
4. At the IAC motion hearing, counsel claims that he knew he was putting his credibility in jeopardy, but he was the only witness that could refute the claims the witness had made.
5. Motion court finds counsel's decision to testify was strategic and not error.

ii. Procedural Posture

1. Nunn is convicted and sentenced to 60 years. Direct appeal to Missouri Ct App affirmed conviction per curiam. Nunn makes rule 27.26 motion alleging IAC pro se, later amended by counsel. Court denies the motion. That ruling is appealed here.

iii. Issue: Did Nunn receive IAC b/c counsel failed to move for a mistrial or withdraw as counsel when he became a witness in the case?

iv. Holding: Nunn demonstrated an actual conflict that adversely effected counsel's performance, thus he received IAC. He is entitled to relief under r. 27.26. Reversal. Should have withdrawn.

v. Reasoning:

1. Subject to "clearly erroneous" standard, r. 27.26(j), achieved if review of the entire record leaves a definite and firm impression of mistake.
2. Supreme Court of Missouri rule 4 prohibits lawyers from accepting employment if it is obvious that they will be called as a witness. A state case *Johnson* explained that the reasons for this rule are:
 - a. Counselor serving as witness opens herself to impeachment (less credible b/c clear stake in outcome).
 - i. Prof: this happens all the time. E.g., cops, agents, etc. are clearly "on a side."

jury to understand that it's not evidence.

3. Lesson: Always have third party present when anything happens that may be subject of proof at trial!

vi. See Trish's outline for more complete facts.

d. **U.S. v. Locascio, 6 F.3d 924 (2d Cir. 1993), p. 751**

i. Note: Orenstein and Gleeson were the AUSAs on this case.

ii. Facts:

1. Gotti and Locascio – Ds in RICO trial. Attys were disqualified for alleged conflict. Gov't moves pretrial to disqualify Gotti's defense counselors, but only disqualification of attorney Cutler is challenged here.

2. District court disqualifies Cutler b/c

a. Cutler "house counsel" receiving "benefactor payments" from Gambinos.

b. Cutler participated in taped conversations in which illegal activity was discussed that would impair his representation of Gotti.

c. Cutler's prior representation of a potential gov't witness; conflict

d. Implication by Gotti on tape that Cutler got \$ under the table.

3. Court notes that this is drastic but there is no available compromise.

4. Gov't moves pretrial to disqualify Locascio's counsel, Santangelo. Witness prepared to testify that Locascio is house counsel for the Gambinos and he is not beholden to Locascio, but to Gotti's instructions and the interests of the Gambino family.

iii. Procedural Posture: appeal from judgment of conviction and two subsequent motions for a new trial in the district court.

iv. Issue: did trial court's pretrial disqualification of Gotti's and Locascio's counsel violate their sixth amendment rights?

v. **Holding: trial court did not abuse discretion b/c Cutler was house counsel to the Gambino Family and may have been as an "unsworn witness" for Gotti.**

vi. Reasoning

1. *Wheat* says central aim of 6th am. is to guarantee an effective advocate.

2. Right to waive conflict not absolute b/c courts have a duty to make sure trial is ethical, fair, and appears to be fair. So the court has an interest here.

3. There is a presumption in favor of accused's counsel unless there is a showing of actual conflict or potentially serious conflict.

4. There was sufficient evidence that Cutler was getting paid by Gambinos/Gotti to represent other people.

5. Cutler's relationship with Gotti, and his firsthand involvement in the events captured on tape, make him an unsworn witness for Gotti. This detriment is to the government and to the court, since defendant is bolstered and factfinding is compromised (atty will be tempted to minimize his wrongdoing).
 6. Same arguments apply to Santangelo, plus, Santangelo's ongoing relationship with Gambino family may be used to prove existence of and connection to the enterprise that he is defending Locascio from being a part of.
- vii. Analysis:
1. Court focuses on two kinds of conflict that suffice for disqualification:
 - a. House counsel: Cutler (atty) works for Gambino family. (Proven by part of tapes that ID him as such. And that same part of tapes is crucial to proving existence of mafia itself.)
 - i. Prof: But "conflict" is a question of divided loyalties. Hard to find divided loyalties when the client is the boss, instead of a little guy. Could claim even Gotti has loyalties to organization beyond himself. But weak. And certainly seems waivable.
 - b. Cutler's role as unsworn witness.
 - i. Ethical rule: If lawyer will be witness, should not continue as counsel.
 - ii. D can waive right to have lawyer testify—just give up oppy to have him as witness.
 - iii. But CANNOT waive unsworn witness problem—unfair to gov't to have Cutler there telling the jury what the tapes mean, and jury knows he really knows what he's talking about.
 - iv. D tries to force P to redact the tapes to avoid the conflict—but can't tell adversary to give up part of its proof just b/c you have a conflict!
 2. Note: Irrelevant that D later got good lawyer. Issue is whether disqualification was correct.

G. PROSECUTORIAL CONFLICTS

a. Duty of Loyalty and Disinterestedness

i. Dick v. Scroggy (6th Cir. 1989), p. 757

1. Habeas corpus case. DUI felony conviction.
2. Prosecutor = plaintiff's lawyer in civil action.
3. 14A DP claim – P's personal interest deprived of DP.
4. Result: Not granted relief. No harm, no foul analysis.
5. Issue: Is there a lack of DP when P has personal interest in going after him, other than just being a prosecutor?

6. Analysis:
 - a. Not a conflict analysis. Look for harm.
 - b. *Morrison* (U.S. 1988): constraints on discretion (even in independent prosecutor w/ political allegiances etc.) not relevant so long as fair trial.
 - c. Not much you can do w/in realm of prosecutorial discretion – count on adversarial process to ferret out those cases that P shouldn't have brought in the first place.
7. Concurrence:
 - a. Thinks we should be worried about Ps with personal interest.
 - b. But need proof of P exploiting the situation.
8. Trish's notes:
9. Facts: Petitioner Dick was prosecuted, resulting in conviction, and later sued by victim who was represented by that same prosecutor.
10. Procedural Posture: appeal from district court denial of habeas.
11. Issue: did prosecutor's dual role as prosecutor and counsel for victim so taint Dick's trial that he was deprived of his liberty w/o due process?
12. Holding: Dick cannot demonstrate prejudice prong of *Strickland*. Affirmed.
13. Reasoning
 - a. *Ganger* (4th Cir): rep in criminal case and divorce proceedings against husband was unconstitutional.
 - b. *Morrison* (Sup Ct): reversed (w/o comment on this argument) case where DC Cir had written that office of special prosecutor gave unconstitutional incentive to go after one individual rather than to administer justice among the population.
 - c. *Wright* (2d cir): even when there is a clear appearance of impropriety, cases are not overturned for excessive prosecutorial zeal unless appellant can demonstrate selective prosecution.
 - d. Troublesome that defense counsel didn't bring prosecutor's dual role to courts attention (probably would have gotten prosecutor off the case) but Dick can't demonstrate an unreliable result from his trial, esp. b/c his BAC was so high.

ii. **Revolving Door** – not covered in class (happens to rarely).

1. Model Rule 1.11

Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees

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

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

(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.

(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:

(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

(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) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

(1) is subject to Rules 1.7 and 1.9; and

(2) shall not:

(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

(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) As used in this Rule, the term "matter" includes:

(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

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

H. IMPUTED DISQUALIFICATION – NOT COVERED

a. Model Rule 1.10

Rule 1.10 Imputation Of Conflicts Of Interest: General Rule

- (a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless
- (1) the prohibition is based upon a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or
 - (2) the prohibition is based upon Rule 1.9(a), or (b) and
 - (i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;
 - (ii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and
 - (iii) certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.
- (b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless
- (1) the matter is the same or substantially related to that in which the formerly associated lawyer 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) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.
- (d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

	Attorney-Client Privilege	Duty of Confidentiality	Work Product Doctrine
Source	Evidence law	Professional/Ethics rules	Common Law (now Fed. R. Civ. P.)
Essence	“You can’t make me tell you this.”	“I can’t tell you this (but judge can make me).”	“You can’t make me tell you this UNLESS...” (qualified)
Scope	<p>Communications made:</p> <ol style="list-style-type: none"> 1. From client or potential client; 2. To lawyer (or subordinate); 3. To obtain legal assistance; 4. No strangers present; 5. Client has asserted privilege and not waived it. <p>(Underlying facts not privileged.)</p>	Information “relating to the representation of a client” from any source. MR 1.6. (Protection includes underlying facts.)	<p>Documents and other tangible things prepared by party, third-party, or lawyer in anticipation of litigation. (Underlying facts not protected.)</p> <p>Note: Preparation probably must be based on explicit or inferred advice from counsel. (says Prof)</p>
Extends to	Anyone “assisting the lawyer in rendition of legal services.” <u>Martha Stewart Case</u> . Includes experts (<u>Martha Stewart</u>), and co-Ds in joint defense agreements (<u>Almeida</u>). (But dissolves if co-Ds part ways.)	Lawyers and their subordinates.	Documents and things created by attorneys, subordinates, parties, experts, etc.
Against whom	Legal adversary, tribunal.	All the world (tell no one).	Legal adversary, tribunal.
Duration	Forever.	Forever. MR 1.6, cmt.	Related litigation.
Who controls?	Only client can assert! (Lawyer can assert or waive as agent of client).	Lawyer has professional duty to keep confidential.	Depends on jx. Client and lawyer. Party invoking bears burden.
Effect	Can prevent admission of evidence.	Defeated by court order or subpoena.	Can prevent admission of evidence.
Exceptions	<p>None. Only waiver.</p> <p>Note: Client identity and fee agreement NOT privileged (though confidential.) See <u>Stern v. U.S. District Court</u>.</p> <p>Breach of and/or exceptions to confidentiality ≠ waiver of privilege. See <u>Purcell v. DA for the Suffolk District</u>.</p>	<p>- Informed consent. MR 1.6(a).</p> <p>- Implied consent. MR 1.6(a).</p> <p>- Constructive consent. MR 1.6(b):</p> <ul style="list-style-type: none"> • (1) death/bodily harm; • (2) prevent crime/fraud; • (3) rectify crime/fraud; • (4) to seek ethical advice; • (5) to defend yourself; • (6) court order. <p>Note: Also trumped by MR 3.3 (candor rule).</p>	<p>Fact work product:</p> <ul style="list-style-type: none"> • Can be overcome by showing of: (1) Substantial need; and (2) Inability to obtain information elsewhere. <p>Opinion work product:</p> <ul style="list-style-type: none"> • I.e., attorney’s mental impressions and litigation strategies. • “heightened” standard. <p>See <u>In re Grand Jury Subpoena Dated</u></p>

			July 6, 2005.
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