There are no points for issues that are not in play!

Fall 2013

Stephen Gillers – Professional Responsibility – Attack Outline

**Order of Operations**

* Describe the problem
* Look up the rule, comment, case law – Outline response
* Apply it!
* Consider policy
	+ Apply it!

AC Relationship 2

Confidentiality 2

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1. **AC-RELATIONSHIP**
	1. **Confidentiality**
		1. **Rules**
			1. Rule 1.1 – A lawyer *shall* provide competent representation to their client
			2. Rule 1.6 – **Confidentiality of information**. (a) A lawyer *shall not* reveal information *relating to* representation without *informed consent*, or *implied authorization* because it is necessary to carry out the representation

Waiver: Client can waive privilege by asserting good faith reliance on counsel’s advice (*Miller*-5) but not by simply denying criminal intent (not good faith or state of mind defense) (*White*-DC)

Crime/fraud:

Can be “on the public” (*Philip Morris*-Minn)

Reaonable basis for believing it was fraud is sufficient (*Deces Tecum*-2)

* + - * 1. (b) A lawyer **can reveal information**

To prevent death/bodily harm

To prevent client from committing crime/fraud, or to prevent/mitigate/rectify substantial injury to financial/property interests of another *which the lawyer’s services have been used for*

Client direction to suborn perjury is not privileged (*Richard Roe*)

Communication must be in furtherance of the crime

To get legal advice about compliance with the Rules

For defense if the client sues the lawyer

*Meyerhofer* – Can reveal statement to Π to get dismissal as co-Δ

*In re Friend* – Can reveal before action is filed with lawyer as co-Δ

Includes action to collect fees

To comply with court order

To detect/resolve conflicts of interest, but can’t violate ACpriv

* + - 1. Rule 1.0(e) – “Informed Consent” means an agreement to a course of conduct after the lawyer communicated adequate info/explanation about material risks and reasonably available alternatives to the proposed course of conduct

Attorney must be acting *as an attorney* – no privilege if attorney is simply negotiating a deal (*Georgia Pacific*-SDNY)

* + - 1. Rule 1.8(b) – Can’t use confidential information to the disadvantage of client without informed consent or an exception
			2. Rule 1.8(f) – A lawyer *shall not* accept $ from someone other than the client unless (1) client gives informed consent, (2) no interference with lawyer’s independent judgment or with AC relationship, (3) information is protected as required in Rule 1.6
			3. Rule 2.1 – Lawyer should exercise independent professional, moral, economic, social, and political judgment
		1. **Analysis – Confidentiality Exceptions**
			1. Client is HIV positive – Client says he has HIV and having (possibly unprotected) sex with former client who is paying bills, but doesn’t want her to know
				1. Is it confidential? Yes, told to aid in bail application
				2. 1.6(b)(1) – Prevent reasonably certain death or substantial bodily harm

Frame as sexual assault/rape since she isn’t consenting to sex with HIV

* + - * 1. Person paying is not the client, client is the client
			1. Lawyer selling home, informed of “well problem” on the land that kills value
				1. Post representation, so they are no longer clients, but still owes duties
				2. Examine substantive law, investigate, ask clients what they know
				3. 1.6(b)(2)/(3) – Lawyer’s services used to commit crime/fraud 🡪 reveal
			2. Consider: Moral obligation to client/court, threat to client candor, always consult/advise client
	1. **Creating AC Relationship**
		1. **Analysis**
			1. AC relationship is formed when a person manifests intent that lawyer provide legal services & lawyer doesn’t manifest lack of consent and knows/reasonably should know the person relies on the lawyer to provide services
				1. No relationship if attorney acts as non-attorney (*Georgia Pacific* – negotiator)
				2. AC relationship can be created implicitly by actions of parties, and does not require payment of fees (*Perez v. Kirk & Carringan*)
				3. *See also* Rule 1.18 – Duties to prospective clients
			2. Presence of 3rd parties breaks ACpriv, but not confidentiality (*Perez*)
			3. Entity Clients
				1. Rule 1.13(f) – When dealing with constituent of a corporate client, lawyer must explain that the organization is the client if the lawyer knows/reasonably should know the constituent’s interests are adverse to the client
				2. Control Group Test – Only CEO, members of the board, and other corporate higher-ups have AC relationship with in-house counsel
				3. *Upjohn* 1: Employee, acting at the direction of a superior (*i.e.* any employee questioned by in-house counsel at the direction of their superior)
				4. *Upjohn* 2: Employee acting *within the scope of corporate duties* & aware that questions were for legal advice is a client of in-house counsel

*Samaritan* – Employee conduct gives/can give rise to corporate liability versus being a “mere witness” 🡪 even if *presence* is within scope of duty

* + - * 1. Restatement – Btwn agent of organization & lawyer re legal matter
		1. **Policy**
			1. For entity clients, note that normative (respect for integrity/autonomy of person) and empirical (encourage candidness) justifications of confidentiality do not apply
		2. **Cases**
			1. *Peres v. Kirk & Carringan* (Tex. 1991)
				1. Π tried/acquitted of manslaughter – Indictment stemmed from Δ revealing confidential info to prosecutor which was in interest of Π’s former employer
				2. Issue: Δ disclosed CI without subpoena, was Π a client?
				3. Δ told Π they were his lawyers, Π didn’t challenge, and Π cooperated with their questioning after truck accident 🡪 AC relationship created
				4. Liability is breach of fiduciary duty resulting in emotional distress
				5. Note

Subpoena allows revealing confidential but not ACpriv info

Presence of nurse breaks ACpriv, but not confidentiality

* + - 1. *Upjohn Co. v. US* (1981)
				1. In-house counsel conducts internal investigation by sending questionnaire to employees and government wants to subpoena results
				2. Holding: AVpriv covers disclosure of *communications*, not underlying facts

Π has to go interview the employees, but can’t get questionnaires

* + - * 1. Lays out two possible tests, one adopted in *Samaritan*
			1. *Samaritan Foundation v. Goodfarb* (Ariz. 1993)
				1. Paralegal interviewed nurses & technician for med-mal case, when deposed later they had amnesia. Held: Witnesses, no AC relationship
	1. **Lawyer-Client Relationship**
		1. **Rules**
			1. Rule 1.2 – Scope of Representation and Allocation of Authority
				1. (a) Subject to (b) and (c)

Client decides *objectives*

Lawyer shall consult with client (according to 1.4) about the *means*

Lawyer acts with implied authorization

Client decides settlement, plea, jury, and whether Δ testifies

* + - * 1. (b) Representation is not an endorsement of client’s views
				2. (c) Lawyer may limit the scope if reasonable and informed consent
				3. (d) Can’t counsel to engage in illegal behavior, but can discuss consequences of such behavior
			1. Rule 1.3 – Lawyer shall act with diligence/promptness
			2. Rule 1.4 – Communication
				1. (a) Lawyer shall (1) promptly inform C of decision/circumstance where C’s informed consent is required; (2) reasonably consult re means to achieve C’s objectives; (3) keep C informed re matter; (4) promptly comply with reasonable information requests, (5) consult with C re any limitation on lawyer’s conduct when C expects assistance forbidden by the rules
				2. (b) Lawyer shall explain a matter to the extent necessary to permit C to make informed decisions re representation
			3. Rule 1.14 – Client with diminished capacity
				1. As much as possible, maintain a normal AC relationship
				2. If C is at risk of substantial harm, lawyer can take reasonable protective action including consulting people that can protect the client, or seeking appointment of guardian ad litem, conservator or guardian
				3. Confidential info still under 1.6, if acting pursuant to (b), lawyer can reveal confidential info under 1.6(a) to the extent necessary
			4. Rule 1.16 – Terminating Representation
				1. Except as in (c), lawyer shall terminate representation if

It will result in violation of the rules or law

Lawyer’s physical/mental condition materially impairs lawyer’s ability to represent client

Lawyer is discharged

* + - * 1. Except as in (c), lawyer can withdraw representation if

Can be accomplished without *material adverse* effect on C’s interests

C persists on a course that lawyer believes is criminal/fraudulent

C uses L to perpetuate a fraud/crime

C insists on action L considers repugnant or fundamentally disagrees with

C fails to fulfill an obligation and has been given reasonable warning

Representation will result in unreasonable financial burden on L

Other good cause

* + - * 1. L must comply with applicable law re notice/permission of tribunal to terminate. L shall continue representation despite good cause if ordered
				2. Upon termination, L shall take steps to protect C’s interests
			1. Rule 1.0(e) – “Informed consent” is an agreement to a proposed course of action upon adequate information/explanation of material risks and alternatives
			2. Rule 2.1 – L shall exercise independent judgment and provide candid advice
		1. **Lawyer’s Autonomy**
			1. Agency (*See* Rule 1.2)
				1. Unless counsel is ineffective, C must accept consequences of L’s decision regarding the *means* of obtaining C’s objectives (*Taylor*)

Even if C is reasonably diligent in communicating with L (*McNulty*)

* + - * 1. C (as principal) is bound by the actions of L (their agent) (*Baker*)

Includes misconduct unless it was *outside the scope of employment*

* + - * 1. Proper remedy for client is malpractice suit (*Baker Machinery*)
				2. Once Δ has a lawyer, lawyer makes all tactical decisions except settlement, plea deals, waiving jury, and Δ decision to testify in criminal case

Cannot force lawyer to argue all non-frivolous claims (*Jones v. Barnes*)

* + - * 1. Note: If the lawyer’s personal interests or the interests of another client interfere with a representation, the lawyer should withdraw
			1. Duty to Inform/Advise (*See* Rule 1.4) (*Nichols v. Keller*)
				1. Lawyer may limit the arrangement if lawyer cautions that

other remedies may be available that are not being investigated

outside counsel should be consulted for those remedies

* + - * 1. Even if retention is limited, lawyer must warn of problems which are reasonably apparent even if outside the scope of retention
			1. Hypos
				1. “In a Box” – Lawyer finds out information from one client that another client should know about a pending business partner

Get consent from the client with the info

Withdraw representation for the client that will be affected

* + - 1. Cases
				1. *Taylor v. Illinois* (1988)

Δ’s lawyer willfully failed to reveal ID of prospective witness for tactical advantage – didn’t inform client, and client had no way of finding out

*McKeon* (2d Cir. 1984) (holding that 801(d)(2) admission by attorney during opening statement @ previous trial at odds with theory of current trial requires balancing (1) whether it was an assertion of fact inconsistent with similar assertions now, (2) inconsistency is clear and obviates need to explore context, and (3) client participated in some way to be admissible

Court refused testimony binding client to the lawyer’s tactical blunder

Dissent: Misconduct is not a tactical decision

* + - * 1. *Baker Machinery & Fabrication, Inc. v. Traditional Baking, Inc.* (7th Cir. ’09)

Default judgment against client whose lawyer told them all was well while doing nothing – client attempted to remain apprised of the case

Held: Proper remedy is malpractice suit

* + - * 1. *Nichols v. Keller* (Cal. 1993)

Π hired lawyer for workers’ comp. claim, attorney didn’t advise about possible civil tort remedies against 3rd parties

Held: Attorney had a duty to inform of reasonably apparent remedies

* + - * 1. *Jones v. Barnes* (1983)

C does not have constitutional right to compel appointed counsel to press all non-frivolous points if counsel decides not to press them on appeal

* + 1. **Client’s Autonomy**
			1. Note
				1. Rule 1.2(a): Client sets objectives, lawyer consults w/ client for means
				2. Rule 1.4(a)(2)-(3): Lawyer consults w/ C for means, and keeps C informed
				3. Rule 1.4(b): Lawyer explains matter to the extent necessary to allow C to make informed decisions
				4. Lawyer may be liable for all losses caused by failure to follow, with reasonably promptness and care, explicit instructions of client (*Olfe*)

Issue of law 🡪 can handle on MSJ, can handle without experts

Honest belief instructions are not in C’s best interest is not a defense

* + - * 1. Lawyer’s judgment on an unsettled point of law is immune from suit

But lawyer still has duty to inform client when the unsettled point would factor into an important decision the client must make (*Wood v. McGrath*)

* + - 1. Cases
				1. *Olfe v. Gordon* (Wis. 1980) (Π sues Δ for failing to follow explicit instruction to take a first mortgage and not a second mortgage when selling her property)
				2. *People v. Petrovich* (NY 1996) (Decision to only have jury consider murder, insanity, and not guilty (excluding manslaughter), was not trial strategy 🡪 client’s choice)
				3. *Arko v. People* (Colo. 2008) (Decision to request lesser offense instruction is strategic so reserved for Δ-counsel)
				4. *US v. Mullins* (5th Cir. 2002) (Δ can testify even against wishes/instruction of his lawyer)
				5. *Williams v. Jones* (10th Cir. 2009) (ineffective assistance of counsel when Δ’s lawyer life to him about plea deal to get him to turn it down)
				6. *Wood v. McGrath, North, Mullin & Kratz* (Neb. 1999) (while lawyer’s judgment on unsettle point of law is immune, failure to inform client on the point when it would factor into client’s decision is colorable malpractice)
				7. *In re M.R.* (NJ 1994) (declaration of incompetency doesn’t deprive client of the right to make decisions, duty of attorney for that client is to protect their rights – if there is a conflict with client’s best interests, seek to have guardian *ad litem* appointed – *i.e.* don’t play both roles)
1. **NO CONTACT RULE**
	1. **Analysis**
		1. **Elements (Rule 4.2)**
			1. When representing a client
			2. The lawyer cannot communicate
			3. On the subject of the representation
			4. With someone the lawyer knows is represented by another lawyer in the matter
			5. Except by consent of opposing counsel, by law, or court order
		2. Clients can talk to each other and lawyer can advise client re those communications
			1. But can’t “overreach” – Assist client in securing an enforceable obligation, disclosure of confidential information, or admissions against interest
		3. SEE ALSO! Rule 4.2 cmt [4] – for no contact analysis – “independent justification”
		4. Rule 4.2 cmt [7] – For an organization, the rule applies to someone
			1. Who supervises, directs, or regularly consults the lawyer on the matter
			2. Has authority to obligate the organization on the matter
			3. Whose act or omission in connection with the matter may be imputed to the organization
			4. No consent required for former constituent
			5. If constituent has personal counsel, that’s who gives consent
		5. Rule 3.4(f) – Entity lawyer can request employees to refrain from voluntarily revealing relevant info to another party as long as the lawyer reasonably believes that person’s interest won’t be adversely affected
		6. Rule 4.2 cmt [8] – Knowledge may be inferred from the circumstances
		7. **Deception**
			1. Use of false subpoena by cooperating witness to illicit incriminating information from Δ is acceptable (*Carona* 9th Cir.), or unacceptable (*Hammad* 2d Cir.)
			2. Rules 8.4(a)/(d) – Lawyers may not use “deceit” or “misrepresentation” personally or “through the acts of another”
			3. *Gidatex v. Campanielly Imports* (SDNY 1999)
				1. Investigators posing as customers is an investigative technique, not deception
				2. Policy of the rule is to prevent statements when counsel isn’t present
				3. Presence of investigator didn’t make employees act any differently than normal thus they weren’t hoodwinked into an admission
	2. **Rules**
		1. Rule 4.2 – Communication with person represented by counsel
			1. When representing a client, lawyer can’t communicate on the subject of the representation with someone the lawyer knows is represented by another lawyer unless authorized by consent, law, or court order
		2. Rule 1.0(f) – “Knowing” denoted actual knowledge of the fact in question which may be inferred from the circumstances
		3. Rule 4.3 – Dealing with an unrepresented person
			1. Can’t state you’re disinterested
			2. Lawyer must ensure the person understands the lawyer’s role in the matter
			3. No giving legal advice other than to secure counsel if person’s interests are in conflict with the lawyer’s client’s
		4. Rule 4.4 – Respect for the rights of 3rd parties
			1. (a) Lawyer shall not use means only to embarrass, delay, burden, or violate the rights of 3rd parties
			2. (b) Notify the sender of an inadvertently sent document
		5. Rule 8.4(a) – Misconduct to violate/attempt to violate the rules of professional conduct, or to knowingly assist/induce someone else to do so
		6. Restatement § 101 – Limits anti-contact rule when government is opposing party – except in a negotiation or litigation of a specific claim against a government agency or against a governmental officer in the officer’s official capacity – otherwise no rule
	3. **Cases**
		1. *Niesig v. Team I* (NY 1990)
			1. Π moves for *ex parte* interviews of company employees who witnessed accident
			2. Held: Can’t interview those covered by 4.2 cmt [6]
		2. *Hill v. Shell Oil Co.* (ND Ill. 2002) (holding that videotaping employees of opposing company going about their normal business doesn’t violate no contact)
2. **FEES**
	1. **Rules**
		1. Rule 1.5
			1. (a) Lawyer shall not charge an unreasonable fee. Factors:
				1. Time/labor required, novelty/difficulty of questions and skill required
				2. Likelihood that accepting employment will preclude other employment by the lawyer, if apparent to client
				3. Fee customarily charged in the locality for similar services
				4. Amount involved and results obtained
				5. Time limitations imposed by client or by circumstances
				6. Nature/length of the professional relationship with the client
				7. Experience, reputation, ability of the lawyer
				8. Whether the fee is fixed or contingent
			2. (b) Have to communicate fee info to client, preferably in writing, before or within reasonable time after representation commences
			3. (c) Contingent fee agreement shall be in writing, and shall outline percentages given possible outcomes (settlement, final judgment, etc.). At the conclusion of the matter, the lawyer has to inform the client of the outcome and fees.
				1. Note: Most jurisdictions limit to 1/3 of recovery
			4. (d) Lawyer shall not get a contingent fee in (1) domestic relations matters (contingent on securing divorce, alimony, support or property), or (2) criminal
			5. (e) Division of fees between lawyers at different firms is ok only if
				1. Division is in proportion to services rendered by each lawyer
				2. Client agrees to the arrangement in writing
				3. And total fee is reasonable
		2. Rule 6.1 – Pro Bono
			1. Lawyer shall aspire to 50h per year to those of limited means, or charitable, religious, civic, community, governmental and educational organizations designed to address the needs of persons of limited means
	2. **Cases**
		1. *Brobeck Phleger & Harrison v. Telex Corp.* (9th Cir. 1979)
			1. Negotiated fee agreement that Telex wanted out of which called for $1mil fee after filing petition for *certiorari* 🡪 ~$25k/hr
			2. Held: Agreement was not unconscionable as determines *from the time when the K was made* (*But see In re Powell* (Ind. 2011) (4mo suspension of attorney for taking fee that was reasonable when entered but became unreasonable by external developments))
			3. Factors: Sophisticated client, negotiated at arm’s length, email indicating Telex understood the terms, Π was a rock star, Π’s presence may have induced settlement, and Π originally wanted hourly, Telex insisted on contingent fee
		2. *Green v. Nevers* (6th Cir. 1997) (court can nix contingency if fee becomes disproportionate to services rendered)
		3. *City of Riverside v. Rivera* (1986) (upholding $245k fee award to lawyers who represented client for unnecessary physical force case against cops resulting in $45k judgment)
		4. *In re Laurence S. Fordham* (Mass. 1996)
			1. Lawyer represents kid for DUI @$200/hr resulting in fee over $50k
			2. Normal fee would have been $3k-$10k
			3. Held: Fee was unreasonable – Novel argument, but time spend educating himself on substantive law and comparison to normal fee for similar work
			4. Rule – Client must enter with “open eyes” – explain rate and estimate hours
		5. *King v. Fox* (NY 2006) (ratification can occur if client (1) has full understanding of the facts making agreement voidable and (2) knowledge of his rights as a client)
		6. *Matter of Hefron* (Ind. 2002) (6mo suspension for switching from hourly to contingent fee when lawyer determined it was worth more)
		7. Brickman, O’Connel, Horowitz rule
			1. 15% of settlement offer @ 60d, then 33% of anything more at trial
			2. Problems: Difficult to make demand, and to know extent of client’s injuries at 60d
				1. Percentage on the first few $ incentivizes the lawyer to aim for more because the probability of getting the low $ is higher
3. **CONCURRENT CONFLICTS**
	1. **Generally**
		1. Significant risk to attorneys – no *mens rea* requirement
		2. Results in successful malpractice claims, fee disgorgement, disqualification, etc.
		3. Rule 1.7 for conflicts rule, Rule 1.8 for scenarios
		4. Two infractions: (1) being in a conflicted situation, (2) violation of client’s interests due to the conflict
		5. NOTE! Both 1.7(b) and 1.8(a) provide mechanisms for opting out of the default rules through fair dealing and informed consent!! Rule 1.2(c) limiting scope!!!
		6. Rule 8.5(b)(1) – Choice of law. For conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise
			1. Typically pops up in screening cases
	2. **Client-Lawyer Conflicts**
		1. **Rules**
			1. Rule 1.7 – Conflict of interest: Current Clients
				1. (a) Except as in (b), lawyer shall not represent a client if the representation involves a concurrent conflict of interest which exists if (1) representation of one client would be *adverse* to another or (2) there is a *significant risk* the representation will be *materially limited* by responsibilities to another client, former client, 3rd party, or person interest of the lawyer
				2. (b) Lawyer may represent notwithstanding conflict if

Lawyer reasonably believes he can provide effective representation

Representation isn’t prohibited by law

Representation doesn’t involve asserting claim by one client against another represented by the same lawyer in the same matter AND

Each client gives written informed consent

* + - * 1. Cmt [6] – Representation on unrelated matters with only economically adverse issues does not create a conflict
			1. Rule 1.8 – Conflict of interest, current clients
				1. (a) Shall not enter a business transaction with a client or knowingly acquire ownership, possessory, security or other interest adverse to the client unless

Transaction/terms fair and reasonable to client, and disclosed in writing

Client is advised in writing to seek outside counsel

Client gives written informed consent to essential terms and lawyer’s role

* + - * 1. (b) Shall not use info relating to rep of client to disadvantage of client unless consent or Rules allow
				2. (c) Shall not solicit substantial gift, or prepare an instrument giving the lawyer a substantial gift unless related to the client (close familial relationship)
				3. (d) Shall not get literary/media rights to portrayal of info relating to rep
				4. (e) Shall not provide financial assistance to client in connection with litigation except (1) advance court costs/expenses, or (2) cover costs/exp. of indigent
				5. (f) Shall not accept $ from someone other than client unless (1) informed consent, (2) no interference w/ independent professional judgment and (3) confidentiality maintained
				6. (g) No aggregate settlements in multiple rep. w/out informed consent
				7. (h) Shall not (1) agree prospectively to limit lawyer’s liability for malpractice unless client is independently represented in agreement or (2) settle claim for same unless they are advised and given opportunity to seek independent rep
				8. (i) Shall not acquire proprietary interest in COA or subject of litigation except

Lien authorized by law to secure fees or

K with client for reasonable contingent fee in case

* + - * 1. (j) No sexy-time with clients
				2. (k) All this crap is imputed across the firm
			1. Rule 1.10 – Imputation of conflicts: General Rule
			2. Blanket Consent – Rule 1.7 cmt – Allowed if client is experienced and reasonably informed regarding risk a conflict may arise particularly if client is independently represented by counsel in giving consent and limited to future conflicts unrelated to the subject of the representation
		1. **Hypos**
			1. “Lawyer, realtor” – Would require 1.8(a) waiver, significant 1.7(a)(2) risk 🡪 can the lawyer really advise someone to walk away from the deal?
		2. **Cases**
			1. *In re Neville* (AZ 1985)

*Johnson v. Nextel Communications, Inc.* (2d Cir. 2011) (breach of FD when lawyer took $7.5mil from class action adversary to get class members to agree to arbitration and give up other significant strategic advantages)

*US .v Hausmann* (7th Cir. 2003) (lawyers convicted of mail and wire fraud when it was discovered that, in addition to their contingent fee, they were getting an additional kick back from a doctor that they were sending patients to)

* + - * 1. 3-way real estate deal between lawyer, client and 3rd party
				2. Disciplinary action even though client knew the lawyer wasn’t representing him on the deal

Rule 1.8(a) would require lawyer to advise client on disadvantageous terms and to seek outside counsel

* + - * 1. Rule – Conflict applies to transactions that, while not formal AC-relationship, an ordinary person would look to the lawyer as a protector rather than adversary
			1. *Fla. Bar v. St. Louis* (FL 2007) – While representing Π against Δ in $60mil suit, attorney disbarred for taking $6mil to represent Δ and quit representing Π
			2. *US v. Gellene* (7th Cir. 1999) (affirming perjury conviction of lawyer whose sworn declaration/testimony to bankruptcy court didn’t reveal firm’s representation of clients with conflicting interests)
			3. *Greene v. Greene* (NY 1982) (Δ lawyer drafted trust agreement granting himself 10% profit of sale of trust assets among other things – breach of Fid. Dut.)
			4. *Matter of Hager* (DC 2002) (lawyer sanctioned after negotiating a “fee” from the adverse party in a class action settlement without informing the client of the deal)
			5. *CenTra Inc. v. Estrin* (6th Cir. 2008) (holding that consent to conflict cannot be implied by client’s knowledge that his firm occasionally represented parties opposed to the client – affirmative duty is on the firm)
				1. Implied Consent requires the client be fully aware of the conflict, yet still proceed anyways
	1. **Client-Client Conflicts**
		1. **Criminal**
			1. 6th Am. right to counsel means right to unconflicted counsel
			2. *Strickland* – Ineffective assistance of counsel due to **misconduct/prejudice**
				1. Must establish lawyer error and prejudice to client

Error – Show errors so serious that counsel was not functioning as counsel guaranteed by the 6th Am.

Prejudice – Lapses rendered trial so unfair as to undermine the outcome

* + - 1. *Cuyler* – Ineffective assistance of counsel due to **conflict**
				1. Δ who doesn’t raise objection must establish

An actual conflict

Adversely affected performance – *i.e.* didn’t call witness, or other theoretical change in tactics

If Δ demonstrates adverse effect, no proximate cause 🡪 doesn’t matter if the outcome would be the same

If Δ does not raise objection, no *Holloway/Cuyler* reversal *even if judge is aware of the conflict* (*Mickens* (2002))

* + - * 1. When Δ does raise objection

Court must investigate or automatic reversal (*Holloway* (1978))

Otherwise court can assume no conflict

* + - * 1. Prosecutor may object to Δ’s representation for finality of judgment

If judge finds conflict, court’s discretion to ignore waiver (*Wheat*)

Erroneous denial of counsel of choice is automatic reversal (*Gonzalez-Lopez* (2006))

* + - * 1. Expediency alone can’t justify ignoring meritorious disqualification unless it can be shown the motion was strategic (*Fiandaca*)
			1. Cases
				1. *Cuyler v. Sullivan* (1980) – 2 lawyers represented 3 Δs, Δ gets convicted before the other two, lawyer called no witnesses. Concern that Δ or one of the other Δs should have testified but didn’t due to conflict of interest between Δs
				2. *Wheat v. US* (1988)

Government objected to Δ’s lawyer because he represented 2 other co-conspirators in their trials and won. All Δs agreed to waive conflict

Argument that other Δs could have been called in Δs trial as witnesses

Held: Disqualification ok because if they had been called, they couldn’t have been cross-examined

Dissent: Just have co-counsel for Δ cross-examine the conflicted clients

* + - * 1. *Burger v. Kemp* (1987) (burden on Δ who claims ineffective assistance of counsel based on a conflict is less demanding than for Δs asserting other kinds of ineffectiveness)
				2. *Griffin v. McVicar* (7th Cir. 1996) (reversal when one Δ’s best defense is to point the finger at another Δ represented by the same counsel)
		1. **Civil**
	+ *Eureka* – When an attorney errs by continuing to represent two clients despite their conflicts, the clients are not penalized by losing their privilege
		- * 1. Communications outside the scope of the joint representation or common interest privilege remain privileged
			1. *Fiandaca v. Cunningham* (1st Cir. 1987)
				1. Class action, lawyer represents female prison inmates challenging lack of services – lawyer also representing class at LSS challenging conditions
				2. Early settlement offers to provide services at LSS for inmate class
				3. Later, inmates want LSS settlement, lawyer recuses himself, Δ rejects and still loses at trial
				4. Held: Remand for new remedy because DC indicated he wouldn’t approve LSS settlement, and conflict didn’t taint jury trial in any way
			2. *Simpson v. James* (5th Cir. 1990)
				1. Simpson takes lien on corporate stock, personal guarantee and some cash for someone buying her company, brokered on both sides by Oliver
				2. Fire destroys part of the business, James (Oliver’s partner) negotiates Simpson taking $50k rather than $200k owed (note insurance was for $200k)
				3. Held: AC relationship existed (firm had Simpson’s business records, etc.), and James was conflicted due to clients’ directly divergent interests
			3. *In re Appeal of Infotechnology* (Del. 1990) (nonclient can’t assert opposing lawyer’s conflict)
			4. *Cinema 5 v. Cinerama* (2d Cir. 1976) (for concurrent client conflicts, adverse representation is *prima facie* improper – burden on attorney to show lack)
			5. *IBM v. Levin* (3d Cir. 1978) (court can disqualify an attorney for failing to avoid even the *appearance* of impropriety)
	1. **Imputed Conflicts**
		1. **Rules**
			1. Rule 1.10
				1. (a) Forbids a lawyer from knowingly accepting work if a colleague would be conflicted unless

It is based on a personal interest of the disqualified lawyer and doesn’t present a risk of materially limiting the representation

Or the prohibition is based on 1.9(a)/(b) (duty to former client) arising out of conflicted lawyer’s prior firm and (i) lawyer is screened, (ii) notice to former client providing for review process, and (iii) certifications of compliance and reporting to former client at reasonable intervals

* + - * 1. (b) When lawyer leaves firm, firm can represent client of former associate unless (1) same/substantially related matter and (2) any remaining lawyer has 1.6/1.9(c) confidential info
				2. (c) DQ by this rule may be waived as in Rule 1.7
				3. (d) DQ associated with government ruled by Rule 1.11
		1. *Calderon v. Micro* hypo
			1. Schmidt is doing Calderon’s estate plan while Mickeljohn is handling a zoning matter for Micro. Calderon and Micro are in litigation
				1. If neither Schmidt/Mickeljohn are working on the litigation, ok
				2. If one is representing in litigation, 1.7(a)(1) problem 🡪 the lawyer may pull their punches and may undermine the trust of the opposing client and their respective attorney
		2. Joint Defense Privilege
			1. Privilege extends to any JDC lawyer and any client, between JDC lawyers, but not between JDC clients
			2. So if clients and JDC lawyers meet, it does not waive privilege
			3. Arrangement needn’t be, but should be in writing
1. **SUCCESSIVE CONFLICTS**
	1. **Rules**
		1. Rule 1.9 – Duties to former clients
			1. (a) Lawyer who formerly represented a client shall not represent another person in the *same or substantially related* matter in which former client’s interests are materially adverse unless written informed consent is given
			2. (b) Lawyer shall not knowingly represent a person in the *same or substantially related* matter in which a firm the lawyer was formerly associated with previously represented a client (1) whose interests are materially adverse and (2) about whom the lawyer had acquired info protected by 1.6/1.9(c) that is material to the matter unless former client gives written informed consent
			3. (c) A lawyer that formerly represented a client in a matter or whose present/former firm has formerly represented a client shall not thereafter:
				1. (1) Use info relating to the representation to the disadvantage of the former client except as the Rules permit, or when the information is generally known
				2. (2) Or reveal information relating to the representation except as Rules permit
		2. Rule 1.9 cmt [2] – Lawyer who recurrently handled a type of problem for former client is not precluded from representing another client in a wholly distinct problem of that type even though subsequent representation is adverse to prior client (“playbook” conflicts)
	2. **Analysis – Former Client**
		1. Were they a client?
		2. Are they a former client?
			1. Episodic?
			2. Matter actually concluded?
			3. Hot potato? (*Unified Sewerage*; *Picker v. Varian* – Can’t just drop client mid-representation in order to avoid conflict with another (especially new) client)
			4. Thrust upon? (*Installation Software* – Rep. Π, client buys Δ 🡪 get consent, or seek leave of the court to drop one to avoid hot potato)
		3. Former client materially adverse interests?
			1. Destroying the product of the prior rendered services?
		4. Matter the same or substantially related to former matter?
			1. Lawyer may not represent an adversary of his former client if the subject matter of the two representations is substantially related (*Analytica*; Rule 1.9(a))
			2. Could lawyer have obtained CI in the 1st rep. relevant to the 2nd?
		5. Lawyer can’t reveal former client CI (Rule 1.9(c)(2))
		6. Can’t use CI to former client’s disadvantage (Rule 1.9(c)(1))
		7. Case – *Analytica, Inc. v. NPD Research, Inc.* (7th Cir. 1983)
			1. Employee of NPD gets stock options that firm represents both sides on
			2. Employee quit, starts competitor, and hires same firm to sue NPD
			3. Held: Conflicted out 🡪 lawyer could have obtained confidential info on the 1st representation that would be relevant to the second
	3. **Laterals**
		1. **Rules**
			1. Rule 1.7(b)(7) – Lawyer can disclose CI to do a lateral, but can’t violate ACpriv or prejudice the client
		2. **Analysis – Laterals (*Cromley v. Board of Education*)**
			1. Presumed
				1. Lateral lawyer had access to confidential information
				2. Shared confidences WRT prior representation
				3. Share confidences WRT current representation
			2. First determine if there is a substantial relationship between prior/present reps.
			3. Ascertain whether presumption of shared confidences is rebutted
				1. Did lawyer *actually* get confidential info?
				2. Can/will they share it? 🡪 either no knowledge to share, or screened (Rule 1.10(a)(2))
			4. “Playbook Doctrine”
				1. Suggests that if a lawyer spent a lot of time representing a class of cases for a client, they couldn’t represent an adverse client on a similar though unrelated matter
		3. **Analysis – Government**
			1. Lawyer can’t enter private practice and take over a case involving an investigation that makes use of government resources (*General Motors*)
				1. If there is no chance of using privileged government info, there is no conflict (*e.g.*, *McAlpin* – Supervisory role that is not close to the details)
			2. Lawyers who formerly serve the government
				1. Are subject to 1.9(c) (1.11(a)(1))

*Monument Builders of PA v. Catholic Cemeteries* (ED Pa. 1999) (holding that former law clerk to federal judge can’t represent client in a matter on which she worked as a law clerk – Rule 1.12(a))

* + - * 1. Can’t represent a client in connection with a matter where the lawyer participated *personally and substantially* unless *the agency* gives informed written consent (1.11(a)(2))
				2. Lawyer that gets confidential/privileged info due to position as a government lawyer can’t use it in a litigation against someone where the information would materially disadvantage that person (1.11(c))
			1. Rule 1.11(d) – Government lawyer is disqualified from matters in which the lawyer participated personally and substantially while in private or nongovernmental practice
		1. **Cases**
			1. *Artmstrong v. McAlpin* (2d Cir. 1980)
				1. SEC Lawyer supervised investigation/litigation against Δ then is retained by Π to recover misappropriated property
				2. Held: No conflict after SEC gave approval to the representation
			2. *General Motors Corp. v. City of New York* (2d Cir. 1974)
				1. NYC brings antitrust case against Δ and hired lawyer that did antitrust litigation for the feds against Δ previously
				2. Held: Disqualified lawyer when potential for lucrative returns following entry into private practice against people already investigated with government resources
1. **PERJURY – CANDOR TO THE TRIBUNAL**
	1. **Rules**
		1. Rule 3.3
			1. (a) Lawyer shall not knowingly (1) make a false statement of fact/law or fail to correct same to a tribunal, (2) fail to disclose controlling directly adverse legal authority in the jurisdiction, (3) offer evidence the lawyer knows to be false
				1. Note: False is not the same as perjured, witness may think it is true
			2. (b) Lawyer who represents a C they know will lie shall take remedial measures
			3. (c) Applies even if disclosure violates Rule 1.6
			4. (d) In an *ex parte* proceeding, lawyer shall inform tribunal of all material facts to enable the tribunal to make an informed decisions, whether or not the facts are adverse
		2. Rule 3.4 – Lawyer shall not (a) obstruct/tamper with evidence, (b) falsify evidence/testimony, (c) disobey an obligation under the rules, (d) make frivolous disco requests or not comply with disco rules, (e) allude to irrelevant information unsupported by evidence, (f) request someone to refrain from giving relevant info unless (1) the person is a relative/employee of the client and (2) the lawyer believes the person’s interests would not be adversely affected by refraining
	2. **Analysis**
		1. Timing – Prospective, surprise, concluded perjury
			1. Duties continue until the end of the proceedings – trial and appeals – then they end 🡪 no further duty to correct past perjury (except in NY)
		2. Nature of the case – Criminal (Δ or other witness), civil
		3. Lawyer’s scienter – Knowledge, or reasonable belief
		4. Remedies – Convince client, reveal to judge, withdraw, narrative, refuse to call witness, let witness testify and reveal the lie on the stand
		5. Consider – Local rules, 6th Am., client autonomy, confidentiality, duty of competence, prohibition on suborning perjury
		6. “The Lecture” 🡪 Need to strike a balance between educating the client about the law so they give you all legally relevant facts, and coaching to the point where you ave to deal with contrasting information
		7. Inferences
			1. “Subin Rule” – Improper for attorney who knows beyond a reasonable doubt the truth of a fact in the state’s case to attempt to refute it through evidence/impeachment/argument
			2. Opposing counsel should never use sexist remarks/inferences in order to gain unfair advantage or evoke emotional responses (*Mullaney v. Aude* (Md. 1999))
			3. Question about false inferences with Δ has or doesn’t have burden of proof
				1. When Δ has burden, false inference looks more like making a materially false statement – when Δ doesn’t have burden, Δ is simply undermining the position of the other side by demonstrating there is room for reasonable doubt
				2. Either way, challenging problem
				3. Argument for “Collaborative Law” movement in divorce cases 🡪 moving away from adversarial system when appropriate
	3. **Cases**
		1. *Nix v. Whiteside* (1986)
			1. Δ wanted to lie about whether he “saw something metallic” when he killed V in self-defense
			2. Lawyer threatened to tell the judge and to withdraw
			3. Δ got on stand, didn’t lie, but got convicted
			4. Held: Not ineffective counsel violating 6th Am. (*Strickland*) because Δ’s testimony was restricted so he couldn’t lie and Δ’s right is to testify truthfully
				1. No right to perjury
		2. *Bronston* – “Do you have any offshore accounts?” 🡪 No
			1. “Have you ever?” 🡪 “The company did”
			2. Held: Answer was an evasion, opposing counsel’s job is to pin him down
		3. *DeZarn* – “In 1991, Were you aware of Wellman’s Preakness party?” 🡪 Yes
			1. “Did you attend?” 🡪 Yes; “Was it a fund raiser?” 🡪 No
			2. Investigation was re 1990 party, lawyer argued it was literally true
			3. Held: Perjury, must look @ context, *Bronston* was demonstrably unresponsive, here it was designed to get the lawyer to come to the wrong conclusion
		4. *Precision Specialty Metals* – Sanctioned lawyer for misrepresenting/misquoting case law to court
		5. *People v. Johnson* (Cal. 1998)
			1. Full cooperation – Not allowed; Persuading not to perjure – Ideal; Withdrawal – Court might deny, problem remains; Disclose – Compromises confidence, Δ may decide to tell the truth; Prevent Δ’s testimony – Attorney is being the judge; Narrative (Mass. and Wisc. do narrative)
		6. *State v. Long* (AZ 1986) (prosecutor can’t use the fact that a Δ attorney uses narrative to insinuate that Δ is lying or guilty)
		7. *People v. Riel* (CA 2000) (no ethical issue if attorney merely *believes* Δ will lie)
		8. *State v. McDowell* (requires client’s unambiguous statement)
		9. *State v. Chambers* (Conn. 2010) (Actual knowledge)
		10. *US v. Litchfield* (10th Cir. 1992) (Δ advised the judge *ex parte* that the client might lie – judge advises to leave it to the jury)
	4. **Consider**
		1. Adversarial versus cooperative system
			1. Cooperative system encourages less investigation, lawyers may want to be less informed re client so they turn over less information, clients may be discouraged from talking to the lawyer
			2. May encourage snowing the opposing counsel with documents
			3. Adversarial system puts the fact finder in the dark as to which facts are neutral to both sides – often less informed about the whole story
2. **DUTY OF CANDOR – TO 3RD PARTIES**
	1. **Rules**
		1. Rule 4.1 – Truthfulness in Statements to others. In the course of representing a client a lawyer shall not knowingly:
			1. (a) make a false statement of material fact or law to a 3rd person or
			2. (b) fail to disclose one when disclosure is necessary to avoid assisting a criminal/fraudulent act by a client unless prohibited by 1.6
				1. Relevant 1.6(b) exceptions:

To prevent death/bodily harm

To prevent client from committing crime/fraud, or to prevent/mitigate/rectify substantial injury to financial/property interests of another *which the lawyer’s services have been used for*

* + - 1. Cmt. 3 – 3 Tier system
				1. Withdraw is usually acceptable
				2. Sometimes noisy withdrawal is required
				3. In extreme circumstances (1.6(b) exception), you have to disclose
		1. Rule 8.4 – Misconduct. It is professional misconduct for a lawyer to:
			1. )(a) violate or attempt to violate the Rules, knowingly assist someone to do so, or do so through someone else
			2. (b) commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects
			3. (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation
			4. (d) engage in conduct that is prejudicial to the administration of justice
			5. (e) state or imply an ability to influence improperly a government agency/official or to achieve results by violating the Rules or the law
			6. (f) knowingly assist a judge/judicial officer in conduct in violation of their rules
	1. **Analysis**
		1. **Puffery** – “My client won’t take less than $200” 🡪 Even if authorized to take $150, not materially false
			1. “If you don’t lower your price, my client will buy elsewhere” 🡪 not materially false even if client has no other source
		2. “We have a witness that will ID the accused” 🡪 If no witness 🡪 materially false
		3. In labor negotiation, lawyer claims something will cost the company $200 when it actually will cost $20 🡪 Materially false – hard fact it will cost $20
		4. Complex formula – Opposition proposes settlement by complex calculation which they mess up, lawyer notices and wants to accept the messed up calculation
			1. Notify client and ask how to proceed
			2. If proceeding without notification
				1. Look at the substantive law of the jurisdiction, remember deal can be undone due to misrepresentation: *Sumerel v. Goodyear Tire* (Colo. App. 2009) (unraveled K after lawyers knowingly accepted oppositions incorrect offer)
				2. Consider: Accept bottom line without reference to formula, or explicitly reject the formula and accept the #: Probably ok because it provides notice
		5. Consider: Predictive statement vs. Historical fact
			1. CYA: “My client informs me that…”
			2. Theme is to not exploit a falsity, but nondisclosure alone usually isn’t enough
	2. **Cases**
		1. *Fire Insurance Exchange v. Bell* (Ind. 1994) (Held as a matter of law that Π could rely on Δ-lawyer statement that insurance policy limit was $100k when it was actually $300k 🡪 Misconduct)
		2. *Hoyt Properties v. Production Resource Group* (Minn. 2007)
			1. Lawyer responds “no” when opposing client asks whether there was any way he could pierce the veil on lawyer’s client
			2. Held: Lawyer was implying materially false facts, or made representations without knowledge 🡪 misconduct
		3. *People v. Jones* (Held prosecutor doesn’t have duty to disclose death of key witness prior to accepting plea deal)
		4. *Virzi v. Grand Trunk Warehouse* (ED Mich. 1983)
			1. Π-client died of unrelated causes, lawyer entered settlement with the court
			2. Note: Normally, no affirmative duty to tell other side about their misapprehension, but you can’t *create* the misapprehension
			3. Held: Rules of Civ. Pro. required lawyer to amend the caption
				1. Violation of duty of candor to tribunal and opposing counsel
		5. *Fair Laboratory v. Quest* (2d Cir. 2013)
			1. In-house counsel for Quest sub. leaves, joins 2 former execs in bringing *qui tam* action against Quest
			2. Quest argues lawyer used confidential information (note he is not suing in personal capacity)
			3. Held: Lawyer revealed far more confidential info than necessary to bring the *qui tam* action 🡪 depo testimony indicated he totally spilled his guts
				1. 1.6 allows disclosure of information necessary to prevent future crime
1. **ENTITY REPRESENTATION**
	1. **Rules**
		1. Rule 1.13 – Client-Lawyer Relationship – Organization as a Client
			1. (a) Lawyer represents the organization acting through its constituents
			2. (b) Reporting up
				1. If the lawyer knows an officer/employee/constituent
				2. Engages/intends to engage/refuses to act in a way that violates a legal obligation to the organization or violates the law
				3. That reasonably may be imputed to the organization
				4. And is likely to result in substantial injury to the organization
				5. Then the lawyer *shall proceed* was reasonably necessary – *shall* refer the matter to higher authority, including the highest authority unless it is not in the best interest of the organization to do so
			3. (c) Reporting out
				1. If, despite best efforts, highest authority insists upon or fails to address an action/refusal to act that is clearly in violation of the law and
				2. The lawyer reasonably believes the violation is reasonably certain to result in substantial injury to the organization
				3. Then the lawyer *may* reveal information whether or not 1.6 permits, but *only if* and *to the extent* the lawyer reasonably believes necessary to prevent substantial injury to the organization
			4. (d) Exceptions to reporting out – ¶ (c) *shall not apply* WRT information relating to a lawyer’s representation of an organization to investigate an alleged violation of law, or to defend the organization or officer/employee/etc. against a claim arising out of an alleged violation of law
			5. (e) Lawyer who believes they were retaliatorily discharged for reporting up/out or who withdraws under circumstances requiring/permitting lawyer to take action, shall proceed as reasonably necessary to assure the organization’s highest authority is informed of the discharge/withdrawal
			6. (f) In dealing with directors/officers/employees/shareholder/constituents, lawyer shall explain the identity of the client when the lawyer knows or reasonably should know the organization’s interests are adverse to those of the constituent
			7. (g) Lawyer representing an organization may also represent a constituent, subject to 1.7, if organization’s consent to dual representation is required, consent shall be given by an appropriate official *other than the individual being represented*, or by shareholders
	2. **Analysis – AC Relationship during M&A**

*Eureka* – When an attorney errs by continuing to represent two clients despite their conflicts, the clients are not penalized by losing their privilege

Communications outside the scope of the joint representation or common interest privilege remain privileged

* + 1. Do former client analysis under 1.9
		2. AC relationship transfers during M&A depending on details of transfer (*Tekni Plex*)
			1. In general, when sub. is sold, AC relationship goes with sub. (*Weintraub*)
				1. *E.g.*, transfer includes all rights, *privileges, liabilities*, and obligations 🡪 AC relationship transfers 🡪 ask if sub. inherited the disputed liability
			2. Mere transfer of assets does not include AC relationship (*Tekni Plex*)
			3. Note: Parties are free to K-around default rules
	1. **Analysis – *UpJohn* Warnings (*In re Grand Jury Subpoena*)**
		1. Safe *UpJohn* warning
			1. We represent the company
			2. These conversations are privileged – but the privilege belongs to the company
			3. The company decides whether to waive the privilege
			4. If there is a conflict, ACpriv belongs to the company
		2. Does a conversation create an independent AC relationship?
			1. Evidence of an *objectively reasonable*, mutual understanding the constituent is seeking legal advice from the investigating attorney
			2. Or that the investigating attorneys were rendering legal advice
			3. Person seeking to invoke privilege must prove he is the client or *affirmatively sought to become a client*
				1. Subjective belief alone is insufficient
				2. Must also be *reasonably under the circumstances* – Consider sophistication
		3. When corporate officer claims privilege (*Bevill* Test)
			1. Must show they approached counsel for seeking legal advice
			2. When they did, they made it clear it was for individual not representative capacity
			3. Must demonstrate counsel communicated with them in individual capacity despite the possible conflict
			4. Must prove their conversation was confidential
			5. And show it didn’t concern matters within or general affairs of the company
	2. **Analysis – Parent-Sub. AC Relationship**
		1. Lawyer represents both parent and sub when (ABA Comment 95-390)
			1. Express/implied agreement
			2. Lawyer receives confidential information (*e.g.*, antitrust, securities, K litigation)
			3. Company acts as alter ego – lack of formalities
			4. Integrated operations, management, and counsel – same email/personnel/building
				1. Not necessarily alter ego if books/financials are separate
			5. Restatement only – When adversity against a non-client member would cause economic harm to another member – if you represent parent and someone asks to bring action against the sub, but the action is so big that the parent would be economically harmed
		2. Sarbanes Oxley
			1. Requires attorney to report up evidence of securities law violations or breaches of fiduciary duty
			2. If no response, requires reporting to audit committee or other committee of the board comprised of outside directors
	3. **Cases**
		1. *Tekni Plex v. Meyner & Landis* (NY 1996)
			1. Buyers bought old TP, created new TP; M&L helped get environmental permits in the 80’s, later worked the old/new TP deal
			2. New TP sues old TP moves to DQ M&L and waive privilege to confidential info
			3. Held – See Rule 1.9 🡪 new TP is former client, this case is substantially related
				1. New TP got AC relationship for environmental compliance matters
				2. Since they would negatively affect the price 🡪 M&L DQ’d
				3. But AC doesn’t transfer for merger negotiation 🡪 new TP didn’t succeed old TP because they were the buyers in the negotiation
		2. *In re Grand Jury Subpoena* (4th Cir. 2005)
			1. Investigating attorneys interviewed AOL employees a bunch of times
			2. Ave *UpJohn* warning, adding that they could represent the constituent if no conflict appeared, later waived privilege and sold them out
			3. Held: No AC relationship 🡪 Attorneys didn’t inform constituent they were represented, no evidence constituent sought legal advice, warned, common interest agreements are ok, but are not retroactive
		3. *Murphy & Demory Ltd. v. Admiral Daniel J. Murphy* (VA Chancery 1994)
			1. M&D corporation with 3 person board, represented by Pillsbury
			2. Company sues Pillsbury and Admiral charging Pillsbury lawyers with aiding Admiral to oust Demory or start competing company while owing fiduciary duty to the corporation
			3. Held
				1. Breach of fiduciary duty – Π had no interest in Δ’s knowledge of how best to undermine the company
				2. Δ’s defense that Π/Δ had interest in ensuring Admiral had the best info possible as to his options even if one option was to divert business was insane
				3. Even associates sent emails to higher ups indicating concerns about breach of fiduciary duty due to conflicts
		4. *In re Teleglobe* (3d Cir. 2007)
			1. Holding that parent controls subsidiary’s ACpriv until parent plans to sell the sub, spin it off as an independent company, or the sub becomes insolvent or is in the zone of insolvency
			2. If parent’s counsel represented parent & sub, then joint client exception applies and sub is entitled to use of parent’s privileged info if they are adverse
			3. Can be avoided through agreements/waivers or providing for non-joint counsel
1. **BAR ADMISSION**
	1. **Rule 5.5 – Unauthorized Practice of Law; Multijurisdictional Practice**
		1. (a) Lawyers shall not practice (or assist another) in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction
		2. (b) A lawyer not admitted to practice in this jurisdiction shall not
			1. (1) establish an office or other systematic/continuous presence in this jurisdiction
			2. (2) represent that the lawyer is admitted to practice law in this jurisdiction
		3. (c) A lawyer admitted in another jurisdiction may provide temporary legal services
			1. (1) Undertaken with local counsel who actively participates
			2. (2) Reasonably related to a pending or potential proceeding before a tribunal in this jurisdiction if the lawyer (or someone assisting) is authorized or expects to be authorized by this jurisdiction
			3. (3) Reasonably related to a pending or potential arbitration, mediation, or other ADR if the services arise out of or are reasonably related to the lawyer’s practice in a jurisdiction where he’s licensed and forum doesn’t require *pro hac* status
			4. (4) Are not within (c)(2)-(3) and arise out of or are reasonably related to the lawyer’s practice where admitted
		4. (d) Rule to allow maintaining an office in a foreign jurisdiction (**see rule**)
		5. Cmt 4 – Presence may be systematic/continuous even if lawyer isn’t physically present in the jurisdiction
		6. Cmt 6 – Actions can be considered temporary even if they are recurring, or over extended time – *e.g.*, lengthy negotiation or trial
	2. **Rule 8.1 – Bar Admission & Disciplinary Matters**
		1. An applicant for admission to the bar, or lawyer in connection with a bar admission application or in connection with a disciplinary matter shall not (a) knowingly make a false statement of material fact or (b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen, or knowingly fail to respond to a lawful demand for info from an admissions/disciplinary attorney except as prevented by Rule 1.6
	3. **Rule 8.5 – Disciplinary Authority; Choice of Law**
		1. (a) A lawyer admitted in this jurisdiction is subject to discipline in this jurisdiction, regardless of where the conduct occurs. A lawyer not admitted here is also subject to discipline here if the lawyer offers/provides services here. Lawyer may be subject to discipline in more than one jurisdiction for the same conduct
		2. (b) Choice of law is where the conduct occurred or the primary effect was felt
	4. **Bar Admission – Moral Character**
		1. **Factors – Admission**
			1. Criminal conduct
			2. Candor during the process
			3. Honesty/integrity in legal academic setting
			4. Mental health (less now)
			5. Financial probity (clean financial record)
			6. Private life (sexual orientation and ability to speak English no longer allowed)
		2. *Griffiths v. Ct* – State can’t forbid legal immigrant who is not a citizen from taking the bar
		3. Steven Glass Hypo – reporter that fabricated news articles, denied admission in NY (included misrepresentations about his cooperation in the ensuing journalism investigation), later applies in CA – appeal not looking good
			1. Concerns about giving imprimatur to this behavior
			2. Concerns about public trust (arguably already thin) in the profession
		4. *In re Mustafa* (DC 1993) (holding that law student who stole $ from the moot court account at UCLA had not established good moral character for admission)
			1. Note: had excellent references, grades, etc. – committed a crime which would have disbarred him for 5y – later admitted, resigned on charges of embezzlement
	5. **Transient Lawyers**
		1. ***Pro hac vice* status**
			1. Temporary admission, by a judge, during litigation
			2. To local jurisdiction for a single matter
			3. Usually under supervision of local counsel
			4. *Leis v. Flynt* (1979) (holding that lawyers have no constitutional right to *pro hac vice* status)
			5. Circuits
				1. 3rd Cir. – Can’t arbitrarily deny status (*Fuller v. Diesslin* (3d Cir. 1989))
				2. 11th Cir. – Conduct must rise to disbarment to deny status

*Schlumberger Technologies, Inc. v. Wiley* (11th Cir. 1997)

* + - 1. *Sobol v. Perez* (ED La. 1968) (enjoining prosecution of attorney for practicing without license when it was shown the judge and prosecutor conspired to reject *pro hac* and proceed with prosecution to foo bar his representation of a black dude for assault)
		1. **Services Other than Litigation**
			1. *Birbrower, Montalbano, Condon & Frank PC v. Superior Court* (Cal. 1998)
				1. NY Lawyers took several trips to CA, did legal work for arbitration
				2. Matter settles, client sues for malpractice, firm counters for fees
				3. Held

“Practice law in CA” entails sufficient contact with CA to render the nature of the legal service clear legal representation

Presence can be virtual (email, phone, etc.)

No fees for work in CA without license, can get *quantum meruit* for fees generated in NY, can’t avoid with local counsel

* + - * 1. Spurred amendment to 5.5 🡪 5.5(c)/(d)
			1. Hypo: Transactional attorney handles client K-negotiations, etc. in other states
				1. Definitely practicing law in other jurisdictions (*Birbrower*, 5.5(b))
				2. But 5.5(c)(4) arguably applies for temporary representation
			2. NOTE: If you’re licensed to practice in a jurisdiction, you can advise on the law of any other jurisdiction (so long as you’re sitting in yours) (subject to the “virtual” status in other jurisdiction)
		1. **Unauthorized Practice of Law**
			1. *Professional Adjusters v. Tandon* (holding that even though adjusters might know the insurance law better than the lawyers, and are licensed, they are not entitled to practice law without a license)
1. **MALPRACTICE**
	1. **Rule 8.4 – Misconduct**
		1. It is professional misconduct for a lawyer to:
			1. (a) violate or attempt to violate the Rules, knowingly assist or induce another to do so, or do so through the acts of another
			2. (b) commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects
			3. (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation
			4. (d) engage in conduct that is prejudicial to the administration of justice
			5. (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules or other law
			6. (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law
	2. **Analysis Generally**
		1. **AC relationship** existed
		2. **Δ acted negligently** or in breach of K
			1. Lawyer’s judgment on unsettled point of law is immune from malpractice (*Wood*)
				1. *But* note a claim can be brought for failure to warn about unsettled point of law that could affect settlement negotiations
			2. Providing substantive advice about a claim and failure to warn about SOL is malpractice (*Tongstad*)
			3. Lawyer must, at a minimum, conduct the necessary research to represent the client (*Jerry’s Enterprises*)
				1. Includes recommendations regarding settlement (*Mutuelles Unies*)
			4. Δ-Lawyer in criminal case has a duty to advise client on whether a particular charge/plea is desirable (*Boria*)
			5. Violation of the rules may be relevant/admissible in assessing legal duty of an attorney in malpractice (*Smith v. Haynsworth*)
				1. BUT the rule must be intended to protect the person in Π’s position or be addressed to the particular harm
		3. Such acts were the **proximate cause** of Π’s injury
			1. If Π seeks disgorgement/forfeit of fees, Π need only prove breach of duty of loyalty, no proximate cause (*Hendry v. Pelland*)
		4. That **but-for Δ’s conduct**, Π would have been successful in prosecuting the claim
			1. Question whether you prove Π would have won on the merits, or would have settled for a specific amount (Restatement § 53, cmt b – Π can prove settlement)
			2. For malpractice in transactional work, Π must prove but-for causation (*Viner v. Sweet* (Cal. 2003))
				1. Circumstantial evidence is allowed

Testimony from opposite party

Expert testimony (but must prove opposite party would have accepted)

Argue Π would never have accepted it without that provision

* + - * 1. Disadvantages: Δ has/can use confidential information to defend the claim; time has passed since the incident/memories fade, etc.
	1. **Cases – Generally**
		1. *Tongstad v. Wesely, Otto, Miller & Keefe* (Minn. 1980)
			1. Π had aneurism, during recovery doc royally fucks up, proven by expert later
			2. Wife approaches Δ inquiring re: malpractice
				1. Δ listens, and informs her he doesn’t think she has a claim

Said he’d consult someone, never did, never contacted her

SOL runs by the time she seeks another lawyer

* + - 1. Expert testified that he should have reviewed hospital records, & checked SOL
		1. *Smith v. Haynsworth, Marion, McKay & Gerurard* (1996)
			1. 2 Haynsworth partners were investors in a deal while firm represented buyers
		2. *Hendry v. Pelland* (DC Cir. 1996)
			1. Multiple representation of 5 Hendrys without consent, with conflict of interest
			2. Some courts award all fees, fees earned after breach, or TOTC analysis
			3. Proximate cause required for compensatory damage, not for fees
		3. *Mutuelles Unies v. Kroll & Linstrom* (9th Cir. 1992) (holding that lawyer recommending settlement risks liability if he doesn’t do the legal/factual research to determine adequacy of the settlement)
		4. *Boria v. Keane* (2d Cir. 1996) (held that Δ-lawyer in criminal case has the duty to advise his client on whether a particular plea appears desirable)
		5. *Baker v. Dorfman* (2d Cir. 2000) (damages against attorney who fraudulently misrepresented his qualifications (said he had taught at NYU!) that later fucked up a court filing resulting in loss of claim – was after SOL ran)
		6. *Cenco v. Seidman & Seidman* (7th Cir. 1982) (holding that shareholder derivative suit is barred by *in pari delicto* defense when attorney *aided the corporation* in defrauding others 🡪 the corporation cannot sue itself for the fraud it perpetrated on others)
	1. **Analysis – Sexing up Clients**
		1. **Rule 1.8(j)** – A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when AC relationship started
			1. Cmt 19 – When client is an organization, no sexing up constituents who supervise, direct, or regularly consult the lawyer concerning organization’s legal matters
		2. *Tante v. Herring* (Ga. 1994) (holding breach of fiduciary duty to access Π’s medical records to Δ’s advantage in coercing her into adulterous relationship during representation)
		3. *In re Tsoutsouris* (Ind. 2001) (holding attorney could be disciplined for sexing client based on conflict of interest by gaining sexual interest in AC relationship – 1.7(b))
		4. Possible factors
			1. Lawyer proposing the relationship
			2. Exchange of confidential info during representation
			3. Power imbalance
			4. The fact that this is wildly unprofessional
	2. **Analysis – Criminal Client Malpractice**
		1. **Four Views**
			1. Conclude there is no difference between criminal/civil – prove causation, get damages (Consider: “contributory negligence” type apportionment)
			2. Insist client proves factual innocence by preponderance
			3. Require having conviction reversed, or vacated before hearing malpractice
			4. Require having it vacated before allowing Π to prove factual innocence before allowing the malpractice claim
				1. *See Peeler* Dissent – If Π can prove but-for malpractice, Π would be legally innocent, there should be no reason to prove factual innocence
		2. Remedy – Seek fee forfeiture/disgorgement (if not appointed), report attorney to the bar, seek *Cuyler* claim (if conflicts) for ineffective assistance
		3. *Atkins v. Dixon* (holding no malpractice claim when lawyer fails to bring speedy trial argument on one of two issues on appeal. For the one he did, charge thrown out, for the other, Δ gets life)
		4. *Peeler v. Hughes & Luce* (Tex. 1995)
			1. Lawyer fails to pass on prosecution offer to let Π off for testimony against co-Δ
			2. Lawyer also represents co-Δ
			3. Held: Must be exonerated on direct appeal, through post-conviction relief, or otherwise
	3. **Analysis – 3rd Party Beneficiaries**
		1. Typically negligent misrepresentation of facts reasonably relied on by 3rd parties
			1. Spot: Formal opinion letters from lawyer surrounding K-negotiation
			2. *See* Rule 8.4(d) – Lawyer shall not engage in conduct prejudicial to the administration of justice
		2. 3rd party duty depends on balancing duty to represent clients vigorously with duty not to provide misleading info on which 3rd party will foreseeably rely (*Petrillo*)
			1. Continued representation of the client when the negligently misrepresented info is passed results in liability (*Petrillo*)
		3. How to CYA
			1. Argue unreasonable reliance by sophisticated parties
			2. Rather than giving an opinion, just send the info the opinion is based on
			3. Tell client about requests for info, and let them send it
		4. **Hypos**
			1. Δ attorney “sting” drug buy from prosecution’s star witness in drug case against client. Lawyer arrested when he approached police with the evidence
				1. Can’t commit a crime to achieve the client’s ends
				2. Use of deception/misrepresentation
			2. Lawyer plagiarizes a bunch of law review articles without citation
				1. Violation of 8.4(b)/(c) – Candor to tribunal, reflects poorly re honesty, copyright violation
			3. Female lawyer specializes in matrimonial disputes won’t represent men
				1. Issue: Discrimination? Rule 1.7(a)(2): Materially limited by lawyer’s interests
				2. Note: Here, potential client has stereotypical “female” role in domestic relationship
				3. Argument: She could turn down a man because of legal arguments that would go against other clients’ interests, but can’t categorically exclude all men
		5. **Cases**
			1. *Petrillo v. Bachenberg* (NJ 1995)
				1. Percolation testing on land 🡪 2/30 tests pass, lawyer sends misleading report to client indicating 2/7 tests pass
				2. Client enters land deal with 3rd party and provides the misleading report with attorney representing client, ruse is found out, 3rd party sues everyone
				3. Key: Lawyer continued to represent the client who provided the misleading report to the 3rd party 🡪 absolutely foreseeable 🡪 liable bitch
			2. *Lawyers Title Inc. v. Baik* (Wash. 2000)
				1. Lawyer writes opinion letter indicating estate/land taxes are paid, sells land which then gets hit with a shitload of taxes 🡪 title insurance company sues
				2. Opinion letter is literally true – “In our opinion…” – but opinion was negligent and foreseeably relied on
			3. *In re Warhaftig* (NJ 1987) (*citing Wilson* (NJ 1979) in finding permanent disbarment for attorney who used client funds to bridge cash flow problems for real estate business transactions that he’d repay after deals close)
			4. *In re Austern* (D.C. 1987)
				1. Lawyer’s client represents he’ll start an escrow account with a bad check for $10k to close a real estate deal

Lawyer is informed of the check and is appointed 1 of 2 agents for account

Doesn’t cash til client gets the $ from another deal to make good on check

* + - * 1. Held: Public censure for providing affirmative assistance in fraudulent conduct – should have withdrawn representation
			1. *DCD Programs v. Leighton* (9th Cir. 1988) (holding that it is counsel’s professional duty to scrupulous accuracy in referring to the record from the DC, negligence is sufficient)
			2. *In re Jordan Schiff* (NY 1993) (Holding that young lawyer’s derogatory remarks to female adversary were part of a calculated rudeness intended to intimidate her 🡪 censure)
1. **NON-PROFIT ORGANIZATIONS – NON-LAWYER PARTICIPATION**
	1. **Rule 5.4 – Professional Independence of a Lawyer**
		1. (a) Lawyer/firm shall not share legal fees with a non-lawyer except that
			1. Agreement may provide for payment of money to lawyer’s estate
			2. Lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer can pay to the estate or other representative of the lawyer
			3. Law firm may include non-lawyer employees in compensation/retirement plan even if plan is based on profit-sharing arrangement
			4. Lawyer may share court-awarded legal fees with nonprofit that employed, retained, or recommended the lawyer
		2. (b) Lawyer shall not form partnership with non-lawyer if partnership will practice law
		3. (c) Lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct/regulate the lawyer’s professional judgment for those services
		4. (d) Lawyer shall not practice with a for-profit professional corporation/association if
			1. Non-lawyer owns an interest, except that a fiduciary representative of the estate of a lawyer may hold stock/interest for a reasonable time
			2. Non-lawyer is a corporate director or officer with similar responsibility
			3. Non-lawyer has the right to direct/control the professional judgment of the lawyer
	2. **Policy**
		1. Protecting lawyer’s professional independence/judgment
		2. Argument that this is already covered under Rule 1.7
	3. **Definitions**
		1. Maintenance – Improperly stirring up litigation by aiding a party to bring/defend a claim without just cause/excuse (*Button* holds this turns on malicious intent)
		2. Champerty – Unlawful maintenance of a suit, where the person without an interest in it agrees to finance the suit in consideration for receiving a portion of the proceeds
		3. Barratry – Offense of frequently exciting and stirring up quarrels and suits between other individuals
	4. **Analysis**
		1. 1st Am. protects using the courts to vindicate constitutional rights (*Button*)
		2. **In-Person Solicitation**
			1. For-profit, in person solicitation may be regulated on showing of potential danger of adverse consequences (*Primus*)
			2. Non-profit, in person solicitation can’t incur discipline without showing activity in fact involved the type of misconduct at which the prohibition is directed (*Primus*)
			3. Non-profit lawyers can seek out clients for purposes of bringing suits in order to engage in political expression protected by the 1st Am. (*Button*)
		3. **Union Cases**
			1. *Trainmen* (1964) (holding that unions can advise members to consult attorneys before settling comp. claims and recommend approved regional lawyers)
			2. *United Mine Workers* (1967) (holding that 1st Am. protects the rights of salary union lawyers to represent members, arguing that 1st Am. protections extend beyond speech characterized as political
			3. *Union Transportation* (1971) (holding that unions can recommend lawyers and negotiate maximum rates for contingent fee representations of members)
		4. Theme: Collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the 1st Am.
	5. **Cases**
		1. *NAACP v. Button* (1963)
			1. NAACP seeking clients as Π’s to sue CA spurring implementation of *Brown*
			2. Argument: Concerns about conflict between divergent interests of client/NAACP
			3. Held: 1st Am. concerns outweigh conflict concerns since non-profit doesn’t have pecuniary interest in litigation and litigation is based on protected political speech
				1. 1st Am. protects turning to the courts to seek vindication of constitutional rights
		2. *In re Primus* (1978)
			1. Lawyer worked for ACLU (for free), reprimanded for soliciting clients to sue in response to forced sterilization to maintain Medicaid coverage
			2. Solicitation was an offer to represent patient for free
			3. ACLU litigation isn’t a technique for resolving private differences, it is a political expression/association – requesting fee shifting doesn’t change outcome
			4. Held: Attorney letter is protected by the 1st Am.
2. **PUBLIC COMMENT ABOUT JUDGES AND COURTS**
	1. **Rules**
		1. **Rule 8.2 – Judicial and Legal Officials**
			1. (a) Lawyer shall not make a statement 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
			2. (b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct
		2. **Rule 4.1(A)(13) (Judicial Rules *I think*)**
			1. Judicial candidate (whether via election or appointment) shall not, in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office
			2. Cmt – Pledges, promises, or commitments are contrasted with statements or announcements of personal views on legal, political, or other issues, which are not prohibited. Candidates who respond to media and other inquiries should give assurances that they will keep an open mind and will carry out their adjudicative duties faithfully and impartially if elected
				1. Impartiality means the absence of bias or prejudice in favor of, or against, particular parties or classes of partis, as well as maintenance of an open mind in considering issues that may come before a judge
		3. **Rule 2.11(A)(5) (Judicial Rules *I think*)**
			1. Requires a judge to disqualify himself if the judge, while a judge or candidate, has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy
	2. **Analysis**
		1. **8.2(a)** – Reckless disregard as to truth or falsity is an objective standard based on the behavior of a reasonable attorney in a similar situation (*Holtzman*)
			1. Statements of opinion are shielded from 8.2(a)
			2. Statements of fact are not: Ask whether it can be objectively measured/tested
		2. **Defamation**
			1. *NY Times v. Sullivan* (1964) (holding that public officials (judges) who sue for *defamation* must prove by C&C evidence that Δ acted with “actual malice”)
			2. *PA Newspapers v. Hepps* (1986) (holding that Π must prove that the defamatory statements are actually false)
	3. **Cases**
		1. *Matter of Holtzman* (NY 1991)
			1. Δ released letter charging judge with misconduct reported to her in a single memo from a case assistant 6wks after the incident
				1. Lawyer made zero effort beyond this memo to ascertain what happened including even meeting in person with the person that reported it
			2. Held: Reckless disregard for the truth is an objective standard of what a reasonable attorney would do under the circumstances – NOT the lawyer’s subjective state of mind
		2. *Republican Party of Minnesota v. White* (2002)
			1. Announce Clause – A candidate for judicial office shall not announce his or her views on disputed legal or political issues that are likely to come before the candidate if elected
			2. Majority strikes down the announce clause under strict scrutiny – 1st Am.
				1. State interest – Preserving impartiality/appearance of impartial judiciary

Three possible definitions of impartial

Absence of bias for or against a party

Announcing an *issue* doesn’t bias a *party*

No preconception on the issues before the judge

But any judge with a record will have obvious preconceptions

Open-mindedness

* + - * 1. Tailoring – Statements in elections are puffery, restricts speech on issues (rather than just parties), judges views are mostly well established 🡪 not narrowly tailored
			1. O’Connor concurring – Concerns about judicial elections generally due to corrupting influence of money, and political promises
			2. Dissent: Judicial elections are different from political ones. Candidates can state their views generally and point to their track record
		1. *In re Snyder* (1985) (holding that a single incident of rudeness is insufficient to find a lawyer is not presently fit to practice law in the federal courts after lawyer wrote a douchy letter to a judge after a request that he prove up his fee request in response to being appointed counsel)
1. **REAL EVIDENCE**
	1. **Rules**
		1. **Rule 3.4 – Fairness to Opposing Party and Counsel.** Lawyer shall not
			1. (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
			2. (b) falsify evidence/testimony
			3. (c) disobey an obligation under the rules
			4. (d) make frivolous discovery requests or fail to comply with disco rules
			5. (e) allude to irrelevant information unsupported by evidence
			6. (f) request someone to refrain from giving relevant info unless (1) the person is a relative/employee of the client and (2) the lawyer believes the person’s interests will not be adversely affected by refraining
		2. **18 U.S.C. § 1515(c)** – This chapter does not prohibit/punish the providing of lawful, *bona fide*, legal representation services in connection with or anticipation of official proceeding
	2. **Analysis**
		1. Nature of the Item – Lawyer may not receive stolen property or illegal weapons without turning them over to authorities (*In re Ryder*)
			1. Lawyer may not retain evidence of a crime even if it is not independently illegal to possess to long as it inculpates Δ (*Sanchez* (Cal. 1994))
			2. Source of the information is typically irrelevant, still turn it over (*Morrell*)
		2. Need to Investigate/Test – Exception to ACpriv re location/related data when lawyer moves evidence then turns it over to police (*Meredith*)
			1. If Δ-counsel leaves the evidence alone, only matter possessed is the communication which remains insulated under ACpriv (*Wemark* (Iowa 1999))
		3. Lawyer can’t destroy evidence to keep it from a “foreseeable” proceeding (*Russell*)
		4. **Gillers’ Analysis**
			1. No obligation to take possession of any item
			2. If lawyer removes it for testing, obligation to return it, or retain it in office if it is a safety issue or V’s stolen property
			3. Lawyer may not take non-dangerous, non-stolen property at all
			4. Enable prosecutor to subpoena or virtually search lawyer’s office
	3. **Cases**
		1. *In re Ryder* (ED Va. 1967)
			1. Attorney moved stolen money and shotgun used in robbery from client’s safety deposit box to his own in an effort to fubar the police investigation or to claim ACpriv if the box is located later
				1. Did consult other people re his actions which was in his favor as disciplinary proceedings – but held that receiving the property was a crime in and of itself
			2. Consider: May want to encourage attorneys to disarm their clients
		2. *People v. Meredith* (Cal. 1981)
			1. Lawyer’s investigator sees incriminating wallet, collects it and gives it to the lawyer who turns it over to prosecutor
			2. Held: Exception to ACpriv when lawyer moves evidence
				1. Lawyer can look but not touch then no duty to talk
		3. *US v. Philip Russell*
			1. Δ destroys hard drive from client-church that had child porn after church fired offender, but didn’t want to turn him in
			2. Indicted for destroying evidence to keep it from a “foreseeable” proceeding
				1. Lawyer had provided names of criminal attorneys to the offender
				2. Settled for 6mo house arrest when facing 2x 20y sentences
		4. Public/Private interaction
			1. *People ex rel. Clancy v. Superior Court* (Cal. 1985)
				1. City retained Clancy, private lawyer, to bring civil abatement proceedings at $60/hr for each successful abatement, and $30/hr for each unsuccessful one. Court struck down the agreement because the government attorney had a personal interest in the litigation so his neutrality was compromised
			2. *County of Santa Clara v. Superior Court* (Cal. 2010)
				1. CA-SC allows government to hire private law firms to bring public nuisance claims in the name of the government, with the fee contingent, so long as the government officials supervise the case and make all critical discretionary decisions including whether to settle.
			3. *State v. Culbreath* (Tenn. 2000)
				1. Court dismissed indictments for obscenity because the underlying investigation and eventual charges were the work of a private lawyer who was assisting prosecutorial authorities but was paid by a private citizen’s group 🡪 conflict of interest
2. **PROSECUTORS**
	1. **Generally**
		1. **Rule 3.8 – Special Responsibilities of a Prosecutor**
			1. (a) Prosecutor must refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause
			2. (b) Make reasonable efforts to assure that Δ has been advised to right to counsel and given reasonable opportunity to obtain counsel
			3. (c) Not seek to obtain a waiver of pretrial rights (*e.g.*, preliminary hearing) from unrepresented Δ
			4. (d) Make timely disclosure of all evidence/information to Δ that Π knows tends to negate the guilt or mitigates the offense including during sentencing unless court orders otherwise
			5. (e) Don’t subpoena a lawyer to give evidence about past or present client unless Π reasonably believes
				1. The info is not protected by privilege
				2. Evidence is essential to successful investigation/prosecution
				3. And there is no other feasible alternative to getting the info
			6. (f) Refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and make reasonable efforts to keep other government officials from similar shenanigans
			7. (g) When Π knows of new, credible and material evidence creating reasonable likelihood that a convicted Δ didn’t commit an offense of which Δ was convicted, Π shall
				1. Promptly disclose the evidence to a court and
				2. If the conviction is obtained in Π’s jurisdiction

Promptly disclose the evidence to Δ unless court orders otherwise and

Undertake further investigation, or make reasonable efforts to cause an investigation to determine if Δ was wrongfully convicted

* + - 1. (h) When Π knows of clear and convincing evidence establishing that a Δ was wrongfully convicted, Π shall seek to remedy the conviction
		1. **ABA Criminal Justice Standard 3.39**
			1. (b) The prosecutor is not obligated 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:
				1. (i) the prosecutor’s reasonable doubt that the accused is in fact guilty
				2. (ii) the extent of the harm caused by the offense
				3. (iii) the disproportion of the authorized punishment in relation to the particular offense or the offender
				4. (iv) possible improper motives of a complainant
				5. (v) reluctance of the victim to testify
				6. (vi) cooperation of the accused in the apprehension or conviction of others and
				7. (vii) availability and likelihood of prosecution by another jurisdiction
			2. (f) the prosecutor shouldn’t 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
	1. **Analysis – *Brady* Violation**
		1. Π suppresses evidence favorable o an accused (exculpatory or for impeachment) violates due process where evidence is material (reasonable probability outcome is different) either to guilt or punishment, irrespective of good/bad faith of Π
		2. Rule covers evidence known to police investigators and not to Π – duty to learn of any favorable evidence known to other government actors
		3. **Elements**
			1. Evidence must be favorable to Δ – Exculpatory/impeaching
			2. Evidence was suppressed by the state – Willful or inadvertent
			3. Prejudice ensued
	2. **Policy – Sentencing/Charging Decisions**
		1. Non-cooperation – Not Δ’s job to do the government’s work for them
		2. Ask empirical question of whether the threat & greater sentence will actually produce the desired result

Rule 1.0, 2, 5, 9

Rule 1.1, 2, 3, 4, 13, 16, 19, 24

Rule 1.10, 13, 16, 19

Rule 1.11, 16, 19

Rule 1.13, 3, 24

Rule 1.14, 4

Rule 1.16, 4

Rule 1.18, 3

Rule 1.2, 4, 5, 6, 12

Rule 1.3, 4

Rule 1.4, 4, 5, 6

Rule 1.5, 10

Rule 1.6, 2, 4, 16, 18, 20, 22, 23, 24, 28

Rule 1.7, 12, 13, 16, 19, 24, 31, 33, 34

Rule 1.8, 2, 12, 13, 31

Rule 1.9, 16, 18, 19, 25, 26

Rule 2.1, 2, 5, 36

Rule 3.3, 20, 41

Rule 3.4, 8, 20, 38

Rule 3.8, 40

Rule 4.1, 22, 36

Rule 4.2, 8, 9

Rule 4.3, 9

Rule 4.4, 9

Rule 5.4, 34

Rule 5.5, 28, 29

Rule 6.1, 10

Rule 8.1, 28

Rule 8.2, 36

Rule 8.4, 9, 22, 30, 32

Rule 8.5, 12, 28

**RULE TOPICS**

**Rule 1.0** Terminology

**Client-Lawyer Relationship**

**Rule 1.1** Competence

**Rule 1.2**  Scope of Representation and Allocation of Authority Between Client and Lawyer

**Rule 1.3** Diligence

**Rule 1.4** Communications

**Rule 1.5** Fees

**Rule 1.6** Confidentiality of Information

**Rule 1.7** Conflict of Interest: Current Clients

**Rule 1.8** Conflict of Interest: Current Clients: Specific Rules

**Rule 1.9** Duties to Former Clients

**Rule 1.10** Imputation of Conflicts of Interest: General Rule

**Rule 1.11** Special Conflicts of Interest for Former and Current Government Officers and Employees

**Rule 1.12** Former Judge, Arbitrator, Mediator or Other Third-Party Neutral

**Rule 1.13** Organization as Client

**Rule 1.14** Client with Diminished Capacity

**Rule 1.15** Safekeeping Property

**Rule 1.16** Declining or Terminating Representation

**Rule 1.17** Sale of Law Practice

**Rule 1.18** Duties to Prospective Client

**Counselor**

**Rule 2.1** Advisor

**Rule 2.2** (Deleted)

**Rule 2.3** Evaluation for Use by Third Persons

**Rule 2.4** Lawyer Serving as Third-Party Neutral

**Advocate**

**Rule 3.1** Meritorious Claims and Contentions

**Rule 3.2** Expediting Litigation

**Rule 3.3** Candor toward the Tribunal

**Rule 3.4** Fairness to Opposing Party and Counsel

**Rule 3.5** Impartiality and Decorum of the Tribunal

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