**Overview:** Theories of Ethics and Structure of the Regime

**What is a lawyer?**

❒ Zealous advocate (*e.g.*, attorney-client relationship, ethics in advocacy)

❒ Autonomous moral actor (*e.g.*, courtroom advocacy)

❒ Lawyer as a “professional”

The term refers to a group “pursuing a learned art as a common calling in the spirit of public service—no less a public service because it may incidentally be a means of livelihood.” (Roscoe Pound). Eliot Freidson of the ABA Commission on Professionalism adds: (1) substantial intellectual training; (2) rely on clients’ trust; (3) trust supposes that professional’s self-interest is overbalanced by devotion to the client’s interest and the public good; (4) self-regulation. The ABA’s statements on professionalism may be aimed at self-affirmation, or at improving the conduct of the bar outside the coercive effect of the rules. Or it may be about revising the rules.

❒ Self-interested economic actor

**Sources of the Law Governing Lawyers**

❒ Constitution (*speech, effective assistance of counsel, takings (escrow), privileges & imm.*)

❒ Statutory (*Procedure/evidence*) ❒ Common law (*tort*, *agency*, *contract*)

❒ Court rules:

❒ Courts have **inherent power** to make rules

❒ **Negative inherent power:** courts have cited their inherent authority to make rules for lawyers to block legislative attempts.[[1]](#footnote-1)

❒ Ethical rules as authority: The rules are afforded varying degrees of respect—

*New York*: The Code does not have the authority of statutory or decisional law (*Weinstock* (1976)), but they may be considered as “guidelines to be applied with due regard for the broad range of interests at stake.” (*Herr* (1995)). Other courts give it force of law (*Vrdolyak* (Ill. 1990)). The federal courts see the regulations of lawyers as federal law, though they may borrow from state or model rules. (*American Airlines* (5th Cir. 1992)).

❒ Other authorities:

❒ Bar advisory opinions ❒ Advice to lawyers by phone or writing ❒ ALI

❒ Ethical theory: “So far, there has been little cross-fertilization, as a *practical* matter, between the philosophical and practical enterprises.” (Gillers).

**KEY TERMINOLOGY** (*Rule 1.0*)

❒ Informed consent (e): *The agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives… .*

❒ Fraud (d): defined by the substantive or procedural law of the jx, and has *purpose to deceive*

*Other defined terms in Rule 1.0—*

❒ Belief and knowledge *may be inferred from the circumstances*

❒ Reasonable denotes the conduct of a reasonably prudent and competent lawyer

❒ Firm denotes law partnerships, but also includes *legal services orgs* and *corporation counsel*

❒ Confirmed in writing ❒ Partner ❒ Reasonable belief & reasonably should know

❒ Screened ❒ Tribunal ❒ Substantial ❒ Writing

**Attorney-Client Relationship:** Formation & Prospective Clients

**FORMATION OF THE ATTORNEY-CLIENT RELATIONSHIP**

*Basic rule*: *Absent* ***court appointment****, a relationship is formed when* (RLGL §14)—

❒ A person manifests to a lawyer the intent that the lawyer provide legal services

❒ Lawyer fails to manifest lack of consent

❒ The person reasonably relies ❒ Lawyer knows or reasonably should know of reliance

*Perez v. Kirk & Carrigan* (Tex. Ct. App. 1991): Bus crash case. The lawyers told Perez that, in addition to working with Coca-Cola, they were “his clients too.” This induced Perez to give a statement suggesting contributory negligence. Perez sued the law firm for breach of fiduciary duty for disclosing the statements.

*Examples and special situations—*

❒ Declining to represent does not necessarily negate a relationship (*Tgstand v. Vesely*)

❒ Relationship may arise from a website (*Barton v. USDC*) or a 900 number (Utah opinion)

❒ Common interest rep. ❒ Entity clients ❒ Class clients

🕱 Court has no power to appoint a lawyer for a fugitive defendant (*US v. Weinstein* (2d))

**DUTIES TO PROSPECTIVE CLIENTS** (*Rule 1.18*) (*any person who discusses the possibility of a relationship*)

❒ Competence (Comment 9; *Rule 1.1*)

❒ Confidentiality: Regardless of whether a relationship formed, lawyer shall not reveal information from consultation, subject to rules governing former clients (*Rule 1.9*).

❒ Conflicts: Shall not represent a client under the following circumstances (*need all*)—

❒ Materially adverse interests ❒ The same or substantially related matter

❒ The lawyer received information from the prospective that could be significantly harmful

❒ None of the following *exceptions* have been met (*Rule 1.18(d)*)

❒ Informed consent by both the client and the prospective client, confirmed in writing[[2]](#footnote-2)

❒ Screening: Another lawyer from the firm may represent the client if the lawyer who took the information from the prospective client took care to avoid more exposure than reasonably necessary to determine whether to represent, and the DQ’d lawyer is timely screened, and written notice is given to the client.

🕱 Unilateral communications: Someone who does this with no reasonable expectation that the lawyer is willing to discuss a relationship is not a “prospective client” (comment 2)

**Attorney-Client Relationship:** Competence and Confidentiality

**DUTY OF COMPETENCE**

*Rule* *1.1: A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation*.

❒ Relevant factors (¶1): complexity of the matter, experience, training in the field, etc.

❒ Novel issues (¶2, 4): Lawyers can tackle new issues by taking time to study or associating

❒ Emergencies (¶3): A lawyer may give advice in an unfamiliar field in an emergency, but it should be limited to what is reasonably necessary.

❒ Maintaining competence (¶6): Lawyers should keep abreast of changes in the law

❒ Specialists may be held to a higher standard of care, particularly in malpractice (Gillers 29)

*Enforcing the duty*: ❒ Discipline where there is egregious error ❒ Malpractice

**DUTY OF CONFIDENTIALITY** (*distinguish between ethical protection and privilege*)

*Rule 1.8*: *A lawyer shall not reveal information relating to the representation unless—*

❒ Informed consent ❒ implied authorization to carry out representation ❒ 1.6(b)

***Permissive*** *exceptions (Rule 1.6(b)) to the extent the lawyer reasonably believes necessary to—*

❒ Harm: Prevent reasonably certain death or substantial bodily harm

❒ *Prevention* of crime or fraud: *Need all—*

❒ Reasonably certain to result in substantial injury to other’s financial or property interests

❒ Client has used the lawyer’s services in furtherance of the crime

❒ Prevention, mitigation or rectification of financial or property injury: *Need all—*

❒ Injury is substantial ❒ Rsbly certain to result or has resulted from *client’s* crime/fraud

❒ Client use the lawyer’s services in furtherance of the crime/fraud

❒ Legal advice: Disclosure to secure legal advice about lawyer’s compliance with the Rules

❒ Litigation involving lawyer: *Need one of the following*—

❒ Establish a claim or defense on the lawyer’s behalf in a case between lawyer and client

❒ Est. defense to a criminal/civil claim against lawyer based on conduct involving client

❒ Respond to allegations in *any proceeding* concerning the representation

*Myerhofer, In re Friend* indicate that the proceeding need not even be commenced for disclosure to be proper

❒ Compliance with other law or court order: *Consider—*

❒ When disclosure seems to be required by law, should discuss with client (see Rule 1.4)

❒ When there is a court order, the lawyer should assert all nonfrivolous claims

*Factors to consider when exercising discretion* (¶15)—

❒ L-C relationship ❒ Possible further injury ❒ Lawyer’s own involvement

**Situations where disclosure is required:**

❒ Must not withhold material facts from non-clients unless required by 1.6 (Rule 4.1(b))

❒ Must be candid and responsive in matters of bar admission, unless 1.6 requires (Rule 8.1)

❒ Must report professional misconduct, unless prohibited by Rule 1.6 (Rule 8.3)

❒ *Reporting-up* requirement under Rule 1.13(c) supersedes Rule 1.6 in a very limited way

❒ Candor toward the tribunal ***supersedes*** Rule 1.6 (Rule 3.3)

**Policies behind Confidentiality Rules**

❒ Empirical: Encourage trust and candor from the client. But this may not actually describe behavior, and it does not work for communications with third parties.

❒ Client autonomy: Confidentiality duties (*and the privilege*) respect client dignity. Here, it is worth noting that states sharply disagree about the importance of client autonomy. This appears most often with respect to bodily harm.

❒ Professionalism

**Attorney-Client Privilege:** *Narrower than the privilege—*

❒ Only communications in confidence ❒ Only communications from the client

*Special rules on the privilege[[3]](#footnote-3) in corporations: Which communications get the privilege?*

❒ Control-group test (*US v. Upjohn* (Cir. Ct.), *rev’d*): Privilege extends only to the officers and agents responsible for directing the company’s actions in response to legal advice.

❒ Subject-matter test (*Upjohn*): Protect communications by all employees, including lower-ranking ones, where protection is ***necessary to defend against litigation***

❒ Initiation test (*Goodfarb* (Ariz.), *abrogated by statute*): *Determine who started contact—*

❒ *Employee initiates contact*: Information is privileged

❒ *Lawyer starts contact*: Privileged only if the info is about the employee’s own conduct within the scope of employment, and is meant to aid the lawyer in lawyering

❒ Purposive test (Ariz. Statute): Very broad test, privileging all communications for the purpose of giving advice to the entity or employee, or for getting information for advice.

❒ “Matter” test (Restatement): *Meets the following elements—*

❒ Between an agent of the organization and the lawyer

❒ Concerns a legal matter of interest to the organization

🕱 Who initiated the contact is irrelevant

***Waiver*** *of the privilege (implicit/explicit): Consider these circumstances—*

❒ Raising the issue: A client waives the privilege where he puts the issue in litigation (*Bilzerian*)

❒ Revelation: Disclosure of all or part of a confidential communication (*In re Martin Marietta*)

❒ Disclosure to government: MIT was held to waive an audit report because it had also given the report to DoD while bidding on a government contract (*US v. MIT*)

❒ “Limited waiver”: *Regarding disclosures in SEC investigatory proceedings—*

❒ *Permissive*: Eighth Circuit permits waiver only for the purpose of the SEC proceedings

❒ *Rejection*: Other circuits hate this, and see it as incongruent with the policies of privilege

❒ *Middle position*: Permit limited waiver if the gov. will keep it confidential (*huh?*)

*Other exceptions to the privilege*—

❒ Crime-fraud (pp. 60–64)

❒ Identity and fees to counsel (65)

❒ “Public policy” (*Payton v. NJ Turnpike* (requiring need, relevance, materiality, exclusivity))

**Attorney-Client Relationship:** Agency Principles

*Conduct is attributable, thus client chooses lawyer at his peril (Boogaerts v. Bank of Bradley)*

❒ Misconduct at trial can bind the defendant, even if he wasn’t consulted (*Taylor v. Ill.*)

In *Taylor v. Illinois* (S.Ct. 1988), the lawyer failed to list an alibi witness, probably as a strategy, and the judge refused to allow him to be called. The court says too bad: the lawyer’s action is **treated as the client’s own**. (Brennan dissents—tactical errors are different from *misconduct*). In *SEC v. McNulty* (2d Cir. 1998), the defendant didn’t hear from the lawyer for a year after the SEC action commenced. A default judgment was eventually entered—the court found the lawyer’s conduct “egregious,” but didn’t reverse the conviction.

❒ Settlement: A lawyer must have *authority* (under law of agency) to bind a client—

❒ *Actual authority*: Client may delegate authority to lawyer to settle

❒ *Inherent auth.*: Lawyers may have authority by virtue of the relationship itself to settle in some circumstances. *Koval v. Simon Telelect* (power to settle in court, includes ADR).

❒ *Apparent auth*.: The most controversial—cases are all over the map

**Confidentiality in Agency Law**

*Restatement of Agency* ***goes beyond Rule 1.6*** *in requiring agents to protect principal’s info even if not related to the purpose of the agency* (R3A §8.05, cmt. (c)).

**Vicarious Admissions** (*Law of Evidence*)

❒ Lawyer can make vicarious admissions: may be used against client, but do not bind her

These need not be at trial. *See Margiotta* (statements to persuade AG not to indict are VA); *Brown v. Hebb* (debt is admitted when L offers lesser amount “for services rendered). On the question of whether **trial statements** may be admissible, the Second Circuit uses a **balancing test:** statement must involve an assertion of fact, inconsistent with similar assertions in a subsequent trial; clear and obvious; equivalent of testimonial statements by a client; the adversary’s inference from the inconsistency is fair and no “innocent explanation.”

❒ Judicial admissions: Statements at trial or in non-superseded court papers are *true* for the purposes of that trial—they do bind client.

**FIDUCIARY DUTIES OF LAWYERS**

*Basic principle*: As an agent, the lawyer also has fiduciary duties to the client. This “unique fiduciary reliance” (*Boon*) begins at the formation of the AC relationship, and extends beyond termination (*People v. Smith*)—

❒ Loyalty ❒ Diligence ❒ Non-competition ❒ Good faith and fair dealing

**DUTIES OF LOYALTY AND DILIGENCE**

*Rule 1.3*: A lawyer shall act with reasonable diligence and promptness in representing a client.

❒ L is ***not bound*** to press for every conceivable advantage (¶1)

❒ Control workload (¶2) ❒ Don’t procrastinate (¶3)

❒ Solo practitioners should have a plan in case of death (¶5)

*What happened to zealous advocacy?* This was central to the Canons. But, in the modern Code, it is replaced by the general rule of diligence. Zeal is relegated to commentary, and highly qualified: “A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client.” (¶1).

**Attorney-Client Relationship:** Duty to Inform and Advise

*A lawyer’s duties of communication (Rule 1.4)—*

❒ Promptly inform client of any decision/circumstance requiring his informed consent

❒ Reasonably consult with client about ***means*** by which objectives are to be accomplished

At trial, exigency may demand that the lawyer act before consulting, but this does not relieve lawyer of the duty to inform the client afterward. (¶3)

❒ Keep the client reasonably informed

❒ Promptly comply with reasonable requests for information

In some cases, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. (¶ 7).

❒ Consult with the client about ethical limitations when the lawyer knows that the client expects assistance that goes beyond the bounds of the Rules

❒ Explain a matter to the extent reasonably necessary to permit an informed decision

*For clients with diminished capacity (Rule 1.14)—*

❒ Maintain a normal attorney-client relationship as far as reasonably possible

❒ Take reasonably necessary protective action (e.g., seeking guardian) *if L believes* (*need all*)—

❒ Client has diminished capacity ❒ Client cannot act in his own interest

❒ Client is at risk of substantial physical, financial or other harm

*When taking such action, lawyer is impliedly authorized to make necessary disclosures.*

*Further duties to consult with clients—*

❒ Conflicts of interest (1.7) ❒ Business relations with clients (1.8(a))

❒ Third-party compensation (1.8(f)) ❒ Former client conflicts (1.9)

❒ Aggregate settlements where the lawyer represents more than one party (1.8(g))

**Is there a duty to inform regarding matters beyond the scope of representation?**

❒ Unsophisticated parties: Several cases indicate that courts will find such a duty

In *Nichols v. Keller* (Cal. App. 1993), plaintiff hired attorneys to pursue a workers’ comp claim. They did not inform him of possible tort claims. “Generally … a WC attorney should be able to limit the retention to the compensation claim if the client is cautioned (1) there may be other remedies which the attorney will not investigate, and (2) other counsel should be consulted … However, even when a retention is expressly limited, ***the attorney may still have a duty to alert the client to legal problems which are reasonably apparent***.”

🕱 Sophisticated parties might not be so lucky (*AmBase v. Davis Polk* (p. 81))

**Attorney-Client Relationship:** Lawyer and Client Autonomy

*Basic rule*: The client is the final authority on the “ends” of the matter, and the lawyer is autonomous with respect to the “means.” (Rule 1.2):

*Client’s authority*—

❒ Objectives of the representation ❒ Right to be consulted on means (*see Rule 1.4*)

❒ Settlement ❒ Plea ❒ Criminal jury trial ❒ To testify

*Overlap with agency law*: “If a paid agent does something wrongful, either knowing it to be wrong, or acting negligently, the principal may have either an action of tort or an action of contract.” (R2A §401; *Olfie v. Gordon*).

*Lawyer’s authority—*

❒ Action impliedly authorized for the representation (may also rely on advance authorization (¶3))

*Paragraph 2*: The Rules do not determine how to resolve conflicts regarding tactics and strategy between lawyer and client. ***Other law***(*agency?*) may be applicable, and the lawyer should consult with the client. If no solution is reached, the lawyer may **withdraw** from the representation, or be discharged.

*Jones v. Barnes* (1983) holds that lawyers need not follow their clients’ wishes to raise every nonfrivolous claim on appeal. Brennan and Marshall dissent. Note that this is an IAC case, and is therefore narrow. Justice Blackmun thought that the lawyer’s conduct was *unethical*, but not unconstitutional.

❒ Reasonably limit the scope of representation, with informed consent

❒ Representation is not considered an endorsement of the client’s worldview

🕱 *Shall not* counsel client to take action that lawyer *knows* criminal or fraudulent

The lawyer may, however, discuss the legal consequences of any proposed course of conduct with a client and may help the client make a good faith determination of the validity, scope, or meaning of the law. Where fraud is already begun, lawyer must **withdraw**, and sometimes **noisy withdrawal** is required. (See Rule 4.1)

**Attorney-Client Relationship:** Termination

*Forms of termination (Rule 1.18)—*

❒ Termination by the client (Rule 1.16(a)(3)) at will (*Carlson v. Nopal Lines*).[[4]](#footnote-4) *Note—*

❒ Mandatory termination by the lawyer

❒ Rep. will result in violation of Rules/law ❒ Physical/mental condition impairs ability

❒ Permissive termination by the lawyer

❒ Withdrawal will not have material adverse effect on interests of client

❒ Client persists in a course involving L’s services that L rsbly believes to be crime/fraud

❒ Client has used services to perpetrate crime/fraud

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

❒ Unreasonable financial burden on L ❒ Rendered substantially difficult by client

❒ Action L considers repugnant ❒ Other good cause exists

❒ Termination by drift (see pp. 105-06; Rule 1.3, ¶4 (episodic clients))

🕱 L must comply with requirements of tribunal, and shall abide by its order notwithstanding

*Upon termination of representation*, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests: *e.g.*, **notice**, **time** to employ other counsel; surrendering **papers and property** [*Sage v. Proskauer*] to which the client is entitled, and refunding any **advance payment** of fee or expense that has not been earned or incurred. Rule 1.16(d).

**Attorney-Client Relationship:** Protecting the Relationship

**The No-Contact Rule**

*Rule 4.2*: *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—*

❒ Consent of the other lawyer ❒ Authorization by court or other law[[5]](#footnote-5)

🕱 Applies even if the represented person consents or initiates contact (¶3)

❒ Clients can talk to each other, and a lawyer may advise a client to initiate such contact (¶4)

❒ Members of a non-certified class are not represented (ABA Op. 07-455)

❒ Does not extend beyond communication (*Hill v. Shell* (videotaping Shell employees allowed))

*Contact with constituents of represented organizations* (¶7)—

❒ Former constituents ❒ Consent of organizational counsel

❒ If constituent is represented individually, then consent of that lawyer is sufficient

🕱 Control group: Constituent “supervises, directs or regularly consults with the organization’s lawyer concerning the matter.”

🕱 Binding authority: Constituent has authority to obligate the org. with respect to the matter.

🕱 Imputation: Constituent’s act/omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.

This approach is parallel with the court’s in *Niesig*. Some jurisdictions take a broader approach, sweeping up everyone whose statements can be used against the organization under state evidence rules.

❒ Government adversaries: *Compare* Restatement §101 *with* ABA Op. 97-408 (p.118)

❒ Testers: May be allowed; they only pretend to be a member of the buying public (*Gidatex*)

**Contact with Non-Represented Persons** (Rule 4.3)

❒ L shall not state or imply that she is disinterested

❒ Make reasonable efforts to correct misunderstandings that L knows or reasonably should know that were formed by the person

❒ If the interests of the person have a reasonable possibility to come into conflict with the interests of a client, L ***shall not dispense legal advice***, other than advice to seek counsel.

❒ May negotiate terms of transactions or settle disputes with the person. (*See* ¶2)

**Improper Acquisition of Confidential Information** (Rule 4.4)

❒ No means that have no subst. purpose other than to embarrass/delay/burden third person

❒ Shall not use methods that violate the legal rights of a third person

❒ L who receives a document relating to representation and knows or reasonably should know that the document was inadvertently sent shall ***promptly notify the sender***.

The rules do not address what else the lawyer must do—these are matters of attorney-client privilege, etc. But if lawyers keep a practice of returning such documents unread, these are matters of professional judgment usually reserved to the lawyer under Rules 1.2 and 1.4. (¶3). *Rico v. Mitsubishi* holds that lawyers ***may not examine a privileged document further than to determine its status***.

***Metadata*** is becoming an emerging problem. On 139, *compare* ABA Op. 06-442 *with* NY Op. 749.

**Ethics in Legal Fees**

**Rules on Fees:** *The basic principles are prescribed in Rule 1.5—*

❒ L may not make an agreement for, charge, or collect an ***unreasonable fee***. *Consider—*

❒ Time and labor ❒ Novel/difficult questions ❒ Skill required

❒ Likelihood, *if apparent to the client*, of precluding other employment

❒ Local custom ❒ Amount involved and results ❒ Time limitations

❒ Nature and length of the professional relationship with the client

❒ Experience and reputation of the lawyers ❒ Fixed or contingent

This rule can encompass some rather large fees. *See Brobeck v. Telex* (arms’ length negotiation, even for a giant fee, is undisturbed by the court). Note this was a case about unconsionability in contract law.

❒ Communication requirements (Rule 1.5(b)) (“*preferably in writing*”)

❒ Contingent fees are permissible, *must* be in writing. *Exceptions—*

🕱 Domestic relations matters 🕱 Criminal cases

The fee must still be reasonable. Consider the likelihood, time involved, size of recovery, amount of work, and size of the lawyer’s percentage.

❒ Dividing fees is permissible *only if* (*need all*)—

❒ Proportionate to services rendered, or each lawyer assumes joint responsibility

❒ Client agrees, confirmed in writing ❒ Total fee is *reasonable*

🕱 Unethical fees may be reduced *or denied* by the court (*e.g.*, *Kaplan v. Pavalon* (7th))

**Special fee agreements:**

❒ Nonrefundable retainer fee agreements: *Two approaches—*

🕱 *Categorical ban* (*Cooperman*)

❒ Acceptable if reasonable fees, sophisticated parties, clear provision, or L has changed position to accommodate client (*McQueen v. Citgo*).

❒ General retainers: Client pays a fixed sum in exchange for the promise to perform any legal services that arise during a specified period. (Brickman and Cunningham). Others define the term as a payment for mere availability. (*Dowling v. Chicago Options*)

❒ Minimum fees: May provide that the lawyer will be paid on an hourly basis, but anything under a certain number of hours will be charged at the minimum.

❒ For any advance, a lawyer must return any unearned portion (Rule 1.5, ¶4)

🕱 *Minimum fee schedules*, adopted by a bar association, violate the Sherman Act (*Goldfarb*)

**Court-Awarded Fees**

❒ Fee shifting cases often take **lodestar** approach (hours reasonably spent x reasonable rate)

❒ Class actions may *either—*

❒ Award a percentage of the recovery

❒ Apply lodestar with a “risk multiplier” reflecting the risk of loss for skillful work

❒ Use lodestar without multiplier (*Goldberger* (noting there was no particular risk))

❒ Federal courts do not abuse discretion by accepting a settlement agreement in civil rights case that required a ***fee waiver*** (*Jeff D.*).

**MANDATORY PRO BONO PLANS**

*The Model Rules still do not require mandatory pro bono work* (Rule 6.1): *Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year*—

❒ Provide a ***substantial majority*** of services ***without fee*** to the following:

❒ Persons of limited means

❒ Organizations in matters designed primarily to address the needs of such persons

❒ Any additional services to:

❒ No fee/low fee services to individuals to organizations seeking to secure *civil rights, civil liberties, or public rights*, or charitable, civic, religious, community, governmental, and educational organizations in furtherance of their organizational purposes.

❒ Low fee services to persons of limited means

❒ Participation in activities for improving the law, legal system, or profession

❒ Also, lawyers should voluntarily contribute to legal aid organizations

**RULE 1.15: SAFEKEEPING PROPERTY** (*format if there’s time*)

**1.15 Safekeeping Property** + *Note on IOLTA [Interest on Lawyer Trust Accounts]*

* (a) L shall hold property in connection w/ rep in separate account, in state where L’s office is located or elsewhere w/ consent of C or 3P. Keep records for 5 years after termination of rep’n
* (b) L may deposit own funds only as necessary to pay bank service charges
* (c) L shall deposit into client trust legal fees & expenses paid in advance, to be withdrawn only as fees are earned or expenses incurred
* (d) upon rec’g funds or other property in which C or 3P has interest, L shall notify C/3P and deliver what C/3P is entitled to receive and upon request provide full accounting
* (e) if L is in possession of disputed property, L shall keep separately until dispute resolved
  + [4] if 3P claim is nonfrivolous L should not turn over to C until resolved
* [1] L is fiduciary, [5] responsibilities independent of legal duties
* [3] don’t hold funds to coerce C into accepting L’s contention
* [6] Ls’ fund for client protection: L may be mandated to participate to contribute to Cs screwed by shifty lawyers
* IOLTA: When created? Estates work
  + Separate account in which you do not deposit own funds
  + Random audits of these accounts in most jurisdictions
  + If bounced check from an IOLTA, automatic referral to disciplinary authorities
* Using $ from escrow = automatic disbarment, even if evidence of repayment

*Note on liens*

* Charging lien: interest in $ paid by 3d party
  + i.e. lien arises automatically from proceeds of case. If P wins, P’s L has a lien on the $ from D until P pays
  + If L withdraws w/o cause, loses charging lien. If dismissed, keep charging lien.
* Retaining lien: lien in property that you have in course of representation.

Retain files until fee is paid. Can be hard on client when you terminate because until they pay you can keep files

**Conflicts of Interest:** Concurrent Conflicts

**GENERAL RULES**

❒ *Rule 1.7*:A lawyer shall not represent a client if (*need one*)—

❒ Direct adversity in a matter (*not limited to litigation*) (*even when matters are unrelated*)

Where clients are “directly adverse” in a non-legal sense (e.g., economic), there may be a **fiduciary problem**, even if there is no conflict under Rule 1.7. In *Fiandaca v. Cunningham*, defendants in a class action made a settlement offer that created a conflict by harming another class that the lawyers represented. The lawyers rejected, and were found to have breached a fiduciary duty.

***Organizational clients*:** By virtue of the representation, a lawyer does not necessarily take on all constituents , parents, affiliates, and subsidiaries of the organization. However, adversity may be found if the *circumstances so demand*, if there is an *understanding between the organization and the lawyer*, or if the obligations are likely to materially limit representation. (¶34).

❒ *Significant risk* that representation will be *materially limited* by L’s *responsibilities* to another client, former client, or third person

***Inconsistent legal positions*:** The possibility that litigation will create precedent adverse to another client does not create conflict. But where a case may create precedent that will harm another client’s position in another case, there is potential for conflict under Rule 1.7. *Consider*: (1) venue where cases are pending; (2) substantive/procedural (*why does this matter?!?*); (3) temporal relationship; (4) significance of the issue to the clients; and (5) clients’ reasonable expectations.

❒ *Significant risk* that representation will be *materially limited* by a **personal interest**.

Where lawyers representing different clients in the same matter are **related**, each client is entitled to know the existence and implications of the relationship before agreeing to the representation. (1.7 ¶11). But if the familial relationship becomes apparent *after* the representation begins, courts may be permissive. *See Gellman v. Hilal*. Personal interest may also arise from **third-party payment** (¶13).

***Organizational clients*:** A lawyer for an organization who is also on the board of directors may find a substantial conflict. (¶35).

❒ Exception (*need all*)—

❒ L *reasonably believes* he can provide competent and diligent representation to each

❒ Representation is not prohibited by law

❒ Does not involve assertion of a claim by one client against another in a tribunal

❒ Each client gives informed consent, confirmed in writing

The rules accept that a client may give consent to **waive future conflicts** that might arise, but this is determined by the same standards as informed consent—see Rule 1.0.

❒ Procedures: To determine whether conflicts exist before taking representation, L should adopt reasonable procedures, *appropriate for the size/type of practice*. (1.7, ¶3)

❒ If conflict arises after taking the client, L ordinarily must withdraw from one rep (¶¶4-5)

**Problems in Common Interest Representation:** *things to consider—*

❒ Consider the effects if adversity arises (¶¶29-30) (*e.g.*, costs, recriminations, *privilege*)

Generally, you lose the privilege if you become adverse. But there may be an exception where the lawyer should have ended the representation but didn’t. *See Eureka Ins. Corp. v. Chicago Title* (DC Cir. 1984).

❒ Representation becomes impossible if one C tells L to remain silent about something (¶31)

❒ Clients must assume more responsibility for decisions because L can’t be partisan (¶32)

❒ Each client still has rights under 1.1, 1.3, 1.9 (former clients), and 1.16 (discharge)

**SPECIFIC PROHIBITIONS** (*Rule 1.8—all are imputed to the firm except the sex one*)

❒ Business transactions with clients, or getting adverse interests, *unless* (*need all*)*—*

❒ Fair and reasonable terms ❒ Fully and clearly disclosed, transmitted in writing

❒ Advised to seek counsel ❒ Given reasonable time to do so

❒ Informed consent in writing

This rule does not apply to ***standard commercial transactions*** for products/services the *client* generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. (¶1). But the rule can be broad. In *Matter of Neville* (Ariz. 1985), the lawyer had represented Bly in real estate matters. Neville violated Rule 1.8 by drafting a contract for property transfer, even though Bly was sophisticated and Neville did not represent him in the deal. “Clients are not likely to see postretainer deals as being at “arm’s length,” and neither are courts.” (Gillers). Violation of this rule may **void the agreement**. *Liggett v. Young* (fiduciary duty case).

❒ Using information relating to representation to client’s disadvantage, *unless* (*need one*)—

❒ Informed consent ❒ Permitted or required by Rules (*see Rule 1.6*)

❒ Solicit a gift, or prepare related instrument, for a client who is not a *close relative*

❒ Before conclusion, negotiate/acquire media rights substly based on info in representation

❒ Provide financial assistance to a client, *except*—

❒ Court costs/expenses with repayment contingent upon the outcome of litigation

❒ Pay (not advance) court costs on behalf of an indigent defendant

Some courts recognize a “humanitarian exception.” *See Fla. Bar v. Taylor* (Fla. 1994); *but see* Conn. Opinion 1990-3 (no exception); *In re Brown* (Or. 1984). The critique of the exception is based on a fear of “unfair competition among lawyers on the basis of their expenditures.” *A.G. Grievance Comm’n v. Kandel* (Md. 1989). Some states have adopted more permissive rules, such as California and D.C.

❒ Accept third-party compensation, *unless* (*need all*)—

❒ Informed consent ❒ No interference with prof’l judgment or AC rltnshp

❒ Protective provisions of Rule 1.6 are complied with

❒ L repping multiple clients can’t participate in aggregate settlements w/o informed consent

❒ Agree to prospectively limit liability for malpractice, unless client is independently repped

Lawyers may, however, ***agree to arbitrate*** a malpractice claim (¶14).

❒ Settle malpractice claim with unrepresented/former client unless she is advised to seek counsel and given opportunity to do so.

❒ Acquire an interest in the litigation, other than an authorized lien or contingent fee

❒ Don’t have sex with your clients, unless they were partners before they were clients

Even if the sexual relationship predates the representation, lawyers must consider whether personal interests will materially limit the representation under Rule 1.7. (¶18). This prohibition ***extends to constituents*** of a client organization.

**IMPUTATION OF CURRENT CONFLICTS** (*applies to lawyers in a firm*—*Rule 1.0*)

*Rule*: When lawyers are associated, none shall ***knowingly*** represent a client where any one of them would be prohibited from doing so by concurrent or former rules. *Exceptions—*

❒ Based on **personal interest**, and no *significant risk* of *material limitation* (1.10(a)(1))

❒ Involves sex with a client (Rule 1.8(k))

**SPECIAL PROBLEMS: THE INSURANCE TRIANGLE**

*Note*: A particular problem of conflict arises when an insurance company appoints counsel to defend the insured in a suit for damages. Where the claim is entirely for relief within the scope of the policy, there is no problem. But, when the claim and the policy are mismatched, the interests of the insured and insurer diverge. *Two main questions—*

* Who is the client: the insured or the insurer?
  + “The sole client is the insured” (*Finley v. Home Ins.*; Charles Silver)
  + Both insured and insurer are clients (*Nevada Yellow Cab*)
* What does it mean to say that the insurer’s obligation to defend is broader than the obligation to indemnify (*Goldfarb*)?
  + *Cumis*: In certain situations, the insured is entitled to separate counsel
  + Cal. Civil Code §2860: When an insurer reserves its rights on a given issue, and the outcome of that coverage can be controlled by insurer counsel, a conflict “may exist.” But no conflict exists solely because of punitive damage claims, or because an insured is sued for more than the policy limit.

Authorities are split on whether, when *Cumis* counsel is afforded, the insured should get to pick it, or the insurer. *Finley* makes the argument that the insurer’s conflicts are sufficiently limited.

**THE ADVOCATE-WITNESS RULE**

🕱 L *shall not* act as advocate where likely to be a *necessary* witness, *unless* (*need one*)—

❒ Testimony relates to an uncontested issue

❒ Relates to the nature and value of legal services rendered in the case

❒ DQ of lawyer would work substantial hardship on the client

❒ L may be advocate in a trial where another L from the firm is a witness, unless conflicted out

*Policies served by the rule—*

❒ *Protecting the jury*­: L’s testimony could be given too much weight, because she has “special knowledge” of the case. (*MacArthur v. Bank of NY*)

❒  *Professional courtesy* may handicap the lawyer on cross

❒ *Protecting the profession*: The bar is “ill-served” when L’s veracity becomes an issue

❒ The jury might not distinguish between the lawyer’s dual roles (*see* Rule comments)

*Note*: Where the rule is mandatory, it requires that the court be able to DQ counsel *sua sponte* when the need arises. In *MacArthur*, SDNY DQ’d an entire law firm in the middle of trial.

**Conflicts of Interest:** Successive Conflicts

**THE GENERAL RULE: DUTIES TO FORMER CLIENTS** (*Rule 1.9*)

❒ L who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client *unless*—

❒ Informed consent, confirmed in writing

*See, e.g.*, *Analytica v. NPD Research* (7th Cir. 1983) (holding that, in Rule 9.1(a) situations, it is impossible and unnecessary to inquire into whether confidences were actually disclosed; access to information is enough). But note that it’s *not just about information.* The rule prohibits switching sides even if no information was obtained. *See Trone v. Smith* (9th Cir. 1980). In contrary cases—*Allegaert* and *Christensen*—“unusual facts should have alerted the client to anticipate” L would switch sides. (Gillers 319).

❒ Absent informed consent in writing, L shall not ***knowingly*** represent a person in the same or substantially related matter in which the ***firm where lawyer was formerly associated*** had previously represented a client (*need both*):

❒ Materially adverse ❒ About whom L had acquired protected info

❒ Protected information is material to the matter

This rule should not **unreasonably hamper lawyers** from forming new associations. (¶4).

❒ L who formerly represented a client *shall not* use info relating to the rep’n to the disadvantage of former client, *unless* (*need one*):

❒ Rules permit (*see, e.g.* 1.6) ❒ Information has become generally known

❒ L who formerly repped a client shall not reveal *any* information except as the rules would permit or require with respect to a client.

*Key Concepts—*

❒ Matter: Fact-dependent. A *type of problem or issue* is ***not*** the same “matter” (¶2)

***“Playbook” knowledge*:** It is unclear to what extent lawyer’s knowledge of a company’s practice area, polices, strategies, etc., can disqualify her from future representation. So-called “playbook” knowledge is sometimes sufficient to DQ. *E.g.*, *Chrysler v. Carey* (ED Mo. 1998) (ex-Chrysler lawyers associate to press class action against Chrysler); *Webb v. DuPont* (lawyer DQ’d from bringing ERISA claims three years after leaving).

❒ Substantially related: *Two considerations* (¶3)—

❒ Involve the same **transaction** or **legal dispute**

❒ *Substl* risk that facts gained in earlier representation would advance client’s position

❒ Acquisition of protected information can be inferred from the circumstances (¶6)

**Who is a former client?** In *Telectronics v. Medtronic*, a corporate L secured patent. Patent was issued in the name of a corporation, and eventually assigned to Medtronic. L later had another client, sued to invalidate patent. ***Not disqualified*:** the lawyer had no relationship with the inventor, only with the corporation, and assignment did not mean that L’s responsibilities were also assigned. *See also* *Eckerd v. Dart* (disqualified) (see page 322).

**“Hot Potato” Problems:**

❒ Firm can’t escape current-conflict rules by “dropping” one client (*Unified Sewerage v. Jelco*)

This serves the client’s interest in *uninterrupted representation* to the conclusion of the matter. A law firm may only withdraw under Rule 1.16. Though there is some ambiguity, **economic interests are generally not deemed acceptable**. (Gillers 323).

❒ *Exception—*“thrust-upon” conflicts, as when a client is bought by another

**MIGRATORY LAWYERS AND IMPUTATION** (Rule 1.10)

❒ Conflicts are imputed to all lawyers in a firm, *unless* (*need one*)*—*

❒ **Personal interest** and no *substantial risk* of *material limitation*

❒ Prohibition arises out of 1.9, and out of L’s association with a prior firm. *Need all—*

❒ L is **timely screened** (1.0; *see below*) and receives no part of the fee

❒ Written notice promptly given to any affected former client to ascertain compliance

❒ Certifications of compliance provided at reasonable intervals on request

❒ Waiver under the conditions stated in Rule 1.7

***Nonlawyers:*** This rule ***does not apply to nonlawyers***, or to work that took place before the person became a lawyer, i.e. as a ***law student***. (Comment ¶4). Such persons, however, ***must be screened***. (¶4). Some jurisdictions apply the successive conflict rules to summer associates. *Actel v. Quicklogic* (N.D. Cal. 1996).

❒ If L leaves firm, firm *may rep* clients materially adverse to former clients. *Unless* (*need all*)*—*

❒ Matter is the same/substantially related to that handled by ex-associate

❒ Any L in firm has relevant information protected by Rules 1.6 and 1.9(c)

❒ No waiver under the conditions stated in Rule 1.7

**Problems with screening:** *Approaches—*

❒ Three-stage test for disqualification (*Cromley v. Board of Ed.*)

❒ Substantial relationship between subject matter of prior & present representations

❒ Presumption of shared confidences with respect to prior rep. (*rebuttable*)

❒ **Presumption of shared confidences w/r/t the *present* representation** (*rebuttable*)

This third presumption is rebuttable, according to the Seventh Circuit, by **institutional mechanisms**, such as instructions to all members of the firm, prohibited access to files, locks and passwords, prohibited sharing of fees derived from the representation. All of this informs the Rules’ doctrine on screening. Oregon also demands that the DQ’d lawyer give an **affidavit** to the former firm testifying that she will not get involved.

❒ Materiality: NY allows screening when the lateral lawyer’s info is “unlikely to be significant or material.” (*Kassis*;Restatement) (effect of the new rules on this holding are unclear).

🕱 No screening: Texas, DC, and California reject screening

***Fear of screening*:** [Most] courts seem to accept that a lawyer may show that he was not aware of any information in the *prior* representation. But many courts think the temptation in the current matter will be too great.

**FORMER GOVERNMENT SERVICE** (Rule 1.11(a)-(c))

❒ Subject to Rule 1.9(c) regarding use of information

❒ Shall not rep a client in a matter in which L participated personally & substantially as a public officer, unless the *agency* gives informed consent

❒ Imputed to firm, unless L is **timely screened**, with written notice to the agency

❒ Cannot represent a private client whose interests are adverse to another *when* (*all*)—

❒ Has confidential government information[[6]](#footnote-6) about the person

❒ Acquired the info as a gov agent/employee ❒ *Knows* the info is confidential

❒ Information could be used to the material disadvantage of the person

🕱 Imputed to the firm unless *timely screened*

**Ethics in Advocacy:** Duty of Candor to the Tribunal[[7]](#footnote-7)

*Rule 3.3—*

❒ Shall not make false statements of fact or law to the tribunal

*Notes*: *Precision Specialty Metals v. US* (L omitted key phrases and citations from arguments; was reprimanded); *Matter of Fletcher* (“grossly mischaracterized” **depositions**, suspended for three years).

❒ Must correct false statements of material fact or law previously made by L

❒ Must disclose legal authority *when* (*need all*)—

❒ Controlling jurisdiction ❒ ***Known*** to L to be directly adverse to position

❒ Not disclosed by opposing counsel

This can also lead to reprimand. *Matter of Thonert* (L was counsel in the adverse case).

❒ Shall not offer evidence L knows to be false. *Includes*—

❒ Correcting material evidence that L comes to know of falsity with reasonable measures, including, if necessary, disclosure to the tribunal

**Reasonable measures** include remonstrating the client confidentially, advising the client of the lawyer’s duty, seeking cooperation to withdraw or correct the evidence. If nothing works, **withdrawal** or, then, **disclosure** may be the only options available. (¶10).

❒ May refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false

A lawyer may, however, present information that he only **reasonably believes** to be false. (¶8). However, knowledge, as always, may be inferred from the circumstances. (Rule 1.0).

❒ Shall take reasonable measures, including disclosure if necessary when (*need all*)—

❒ Representing a client in adjudicative proceeding

❒ The person intends to engage, or has engaged, criminal or fraudulent conduct

This is purposefully broader than false testimony, and extends to issues like *bribery*, *intimidation* (¶12).

❒ The conduct is related to the proceeding ❒ L knows this

***These duties continue after the conclusion of proceedings, and even if they require disclosure otherwise prohibited under Rule 1.6.***

**Tactics for dealing with a client who plans to lie:**

🕱 Full cooperation: No tribunal has ever endorsed the idea that L should fully cooperate with the client’s plan to lie. This would be suborning perjury. (*See People v. Johnson*)

❒ Persuasion ❒ Withdrawal is permitted, but does not really solve the problem

❒ Disclosure to the court ❒ Refusing to allow D to testify (*Nix v. Whiteside* (IAC claim))

❒ Narrative: Calling D, but asking no questions (*Compare Johnson* (allowing), *with* *Nix* & ABA)

*Epistemic and other ethical problems*:

* *Nix* places weight on whether the lawyer ***knows*** that D will lie. Standard? (Gillers 393)
* Can it be ethical to ***avoid*** knowledge, or to ***prime*** the defendant? (*Anatomy of a Murder*)
* Where we have less than real knowledge, maybe it’s the jury’s role to decide (*Litchfield*)
* *Discovery*: Lies are likely to happen in discovery, and ***revelation*** may be the only appropriate remedy (ABA Op. 93-376). *See also* FRCP 26(e)(1) (398).
* *Intersection with law of perjury*: Where an answer is ***true but intended to deceive***, Scotus found it is nonetheless the adversary’s job to elicit truth (*Bronston; but see DeZarn*). *But the reach of ethical rules may be much broader*. (*Matter of Shorter* (DC Cir.) (disbarring L)).

**MERITORIOUS CLAIMS (Rule 3.1):** A lawyer’s claims and argument must (*need all*)—

❒ Firm basis in law and fact (in conjunction with 1.16, L must withdraw if she realizes client has no case)

❒ Not frivolous

A filing is not frivolous just because the facts have not been fully substantiated, or because the lawyer hopes to develop the record on discovery. But lawyers must **inform** **themselves** about their clients’ cases and determine that they can make good faith arguments in support of the positions. (¶2).

❒ If pushing against existing law, must be in good faith

\* Wherever incarceration could result, a lawyer can defend the proceeding so as to require that *every element of the case be established*.

**EXPEDITING LITIGATION (3.2)**: Reasonable efforts consistent with client’s interest

❒ L may ask seek a postponement for personal reasons, but not repeatedly (¶1)

🕱 May not use dilatory tactics to frustrate an opposing party’s attempt to get redress (¶1)

🕱 Realizing financial interest by delay tactics is not a legitimate interest of the client (¶1)

“Dilatory practices bring the administration of justice into disrepute.” (¶1). They may also violate **FRCP 11**.

**FAIRNESS TO OPPOSING PARTY AND COUNSEL (3.4):** *A lawyer shall not—*

❒ Unlawfully obstruct access to evidence or alter/destroy/conceal material evidence

This is actually quite complicated. It may allow a lawyer to take **temporary possession** of evidence, but the Rules seem to “punt” to the criminal law (Gillers 457). Addressed below. *See In Re Ryder* (lawyer removes real evidence from a lockbox—possessing this stuff was a crime in itself (stolen goods, illegal weapon), and in any event, Ryder could not conceal the evidence from the authorities).

❒ Falsify evidence, counsel a witness to testify falsely, or offer illegal inducement to witness

In most jurisdictions, it is improper to pay **any fee to an occurrence witness**, and improper to pay a **contingent fee to an expert witness** (¶3).

❒ Knowingly disobey an obligation under tribunal rules, *except for “open refusal”*

❒ Pretrial: frivolous discovery requests, or fail to make reasonably diligent efforts to respond

❒ Trial:

❒ Allude to any matter L does not reasonably believe is relevant or won’t be supported

❒ Assert personal knowledge of facts in issue when not testifying as a witness

❒ State a professional opinion as to the justness of a cause, guilt, or culpability

❒ Request person other than client to voluntarily refrain from giving evidence, *unless* (*both*)—

❒ Relative/employee/agent of client

❒ L reasonably believes the person’s interests won’t be adversely affected

**IMPARTIALITY AND DECORUM OF THE TRIBUNAL (3.5):** *A lawyer shall not—*

❒ Seek to influence a judge, juror, or prospective juror, or other official by illegal means

❒ Communicate *ex parte* with such a person unless authorized by law/court order

❒ Communicate with juror/prospective juror after discharge if (*need only one*)—

❒ Juror has made known to L a desire not to communicate

❒ Prohibited by law or court order

❒ Communication involves misrepresentation, coercion, duress, harassment

❒ Engage in conduct intended to disrupt a tribunal

**NONADJUDICATIVE PROCEEDINGS (3.9)**

❒ Disclose that the appearance is in a representative capacity

❒ Comply with Rule 3.3 (all but part (d) on *ex parte* communications)

❒ Shall not unlawfully obstruct access to evidence or alter/destroy/conceal material evidence

❒ Shall not falsify evidence, counsel witness to lie, or offer illegal inducement to witness

❒ Shall not knowingly disobey an obligation under tribunal rules, *except for “open refusal”*

❒ Comply with Rule 3.5

**The Court-Imposed Sanctions Regime (FRCP 11)**

*A lawyer’s signature on a pleading or motion certifies, to the best of her knowledge, information, and belief, formed after reasonable inquiry under the circumstances*—

❒ No **improper purpose** (e.g., harassment, unnecessary delay, increase in litigation costs)

❒ Claims are **warranted** by existing law, or by a nonfrivolous argument for modification

❒ Factual contentions have **evidentiary support**, or, if *specifically so identified*, are likely to have such support after a reasonable opportunity for discovery.

❒ **Denials** warranted on the evidence, or *if stated*, reasonably based on lack thereof

*Sanctions* must be limited to what suffices to deter repetition of conduct. (FRCP 11). A ***party*** who signs a pleading, as opposed to a lawyer, may be liable for sanctions for all but unwarranted *claims of law*. Note the first box, above. Assholes—*Paramount v. QVC* (Joe Jamail); *Mullane v. Aude* (sexists)—get sanctions.

**Other sanctions:**

❒ Fees: A party who “unreasonably and vexatiously” “multiplies” proceedings can be required to pay costs and fees (28 USC §1927)

❒ Discovery abuse and other misconduct in civil litigation (FRCP 16, 26, 37)

❒ Damages, single costs, or double-costs for frivolous appeals (FRAP 38)

❒ Inherent power: Courts may award fees and expenses for bad faith, etc.

**Special Issues in Litigation:** Real Evidence

*Rule 3.4 “punts” to the criminal law on the question of when a lawyer can take possession of or destroy evidence.*

**Things to Consider in Obstruction of Justice Issues:**

❒ Proceedings: Some statutes/cases apply only when *pending* court or grand jury proceedings (*Solow*), but others extend far beyond that so long as “defendant expected a grad jury investigation or trial in the future (SOX, §1512(f)(1); *US v. Frankhauser*).

❒ Sarbanes-Oxley can apply beyond traditional corporations (*Russell*) (see page 460)

❒ Witness tampering by encouraging document destruction (§1512(b)(2)(B))

❒ Corruptly destroying documents or otherwise obstructing proceedings (§1512(c))

This does require **scienter**. (Arthur Andersen case).

**Real Evidence and the Attorney-Client Privilege**

*People v. Meredith*: “If defense counsel leaves the evidence where he discovers it, his observations derived from privileged communications are insulated from revelation. If, however, counsel chooses to ***remove*** evidence to examine or test it, the original location and condition of that evidence loses the protection of the privilege.” (**the turnover duty**) (468).

❒ So the lawyer can just leave evidence where it is

❒ Or, if evidence is on *defendant*, L might be able to take it without turning over (*Nash*; *Olwell*)

**E-Discovery:** *The following obligations are placed on counsel* (*Zubulake v. UBS*)—

❒ Litigation hold: suspend routine document destruction, etc.

❒ Counsel must oversee compliance with the litigation hold

❒ Communicate directly with the “key players” in the litigation

❒ Instruct all employees to produce electronic copies of their recent active files

*Purposes of this process—*

❒ Ensure that all relevant information is discovered

❒ Relevant information is retained on a continuing basis

❒ Relevant non-privileged material is produced to the opposing party

**Negotiation and Transactional Matters**

❒ Truthfulness: A lawyer shall not knowingly (*either*) (4.1)—

❒ Make a false statement of material fact or law to a third person

**Certain statements are not generally taken as material fact:** Estimates of price/value placed on the subject of the transaction, party’s intentions as to the ultimate settlement of a claim, the existence of an undisclosed principal (¶2).

But note that *Fire Insurance Exch. v. Bell* establishes that opposing counsel has the **right to rely** on statements of fact made by opposing counsel. A **legal opinion** may also give rise to liability if the opinion implies that the underlying facts are false. *Hoyt Properties v. Production Resources* (companies are “totally separate” implies a factual circumstance).

❒ Fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act, unless prohibited by Rule 1.6.

Note that this is technically weaker than Rule 3.3, as it is limited by Rule 1.6. But consider the exceptions.

**Duty of frankness to opposing counsel?** *Virzi* stands for the proposition that plaintiff must disclose “major events” such as the death of the client to opposing counsel, as well as to the tribunal. *See also State v. Addison* (L has a duty to disclose a second insurance policy when negotiating hospital expenses); *Kath v. Western Media*. *But see People v. Jones* (prosecution had no duty to reveal victim’s death in settlement negotiations, although the state would no longer be able to prove its case).

❒ No contact: L shall not communicate about the subject of the representation with a person L ***knows*** to be represented by another lawyer in the matter (4.2), *unless* (*either*)*—*

❒ Consent of opposing lawyer ❒ Authorized by law or a court order

❒ *Duties with respect to unrepresented persons* (4.3)—

❒ Shall not state or imply that the lawyer is disinterested

❒ Where L *knows or reasonably should know* that the person misunderstands L’s role, make reasonable efforts to correct the misunderstanding

❒ Shall not give advice to an unrepresented person, other than to secure counsel, where there is possibility of conflict (*knows or reasonably should know*)

*Controversial holding?* Where faced with an unrepresented client, an attorney must do two things: (1) explain to the party that the attorney is representing an adverse interest; (2) **explain the material terms** of the documents that the attorney has drafted for the client so that the opposing party fully understands their actual effect. [Note: the court limited this second holding to the facts of this case.] *Fla. Bar v. Belleville*.

❒ Not use means that have no other purpose but to embarrass, delay, or burden 3P (4.4(a))

❒ Shall not use evidence-gathering methods that violate a person’s legal rights (*id.*)

❒ Promptly notify sender upon receiving a document inadvertently sent (4.4(b))

🕱 Threatening criminal prosecution in order to gain an advantage

This was in the old Code but absent from the model rules. ABA Op. 92-363 holds that a lawyer may raise the possibility of civil charges in negotiating a civil claim so long as the matters are **related**, and the lawyer **does not claim an improper influence** over the criminal process. *See also State v. Worsham* (declining to discipline). Some states have retained the Code prohibition (DC, Cal., Fla. Op. 89-3, 89-4).

**Organizational Clients**

**Basic Rule (1.13):** *A lawyer retained or employed by an organization represents the organization acting through its constituents*.

**Parent or Sub, or both?** *See Tekni-Plex v. Meyner & Landis* (535) (disqualifying lawyer); ABA Op. 95-390 (affiliate may be a client also, if they are alter-egos) (555).

**Provisions for bad apples (1.13(b)-(d)):**

❒ Violations: L shall proceed as *rsbly necessary* in the corp’s best interest when (*need all*)—

❒ An employee acting, intends to act, or refuses to act in a way that violates law

❒ The violation is of an obligation of the corporation, or reasonably might be imputed

❒ The violation is in a matter relating to the representation

❒ The lawyer ***knows*** this is happening

**How to proceed?** Consider seriousness, consequences, responsibility in the org., motivations, policies of the org. Though referral is usually necessary, sometimes it is best to encourage reconsideration (¶4).

❒ In the above case, L shall refer the matter to higher authority, including, if warranted, the highest authority that can act on behalf of the organization

**Highest authority:** Usually means the board of directors or similar. L is always *allowed* if not required to refer to the highest authority. (¶5).

❒ L ***may disclose*** information, regardless of Rule 1.6, *if* (*need all*):

❒ Despite L’s efforts above, the highest authority insists, or fails to address in a timely and appropriate manner, a ***clear*** violation of the law.

❒ L ***reasonably believes*** the violation is ***reasonably certain*** to result in ***substantial*** injury to the ***organization***

❒ The disclosure only to the extent necessary to prevent such injury

🕱 Investigation/Defense: Ls hired to do these things are not covered (1.13(d))

❒ No exceptions for withdrawal: If L *rsbly believes* she is discharged for doing the above, or withdraws under such circumstances, she shall proceed as she *reasonably believes* necessary to ensure the highest authority is informed.

**Representing and communicating with constituents (1.13(f)-(g))**

❒ Directors ❒ Officers ❒ Employees ❒ Members ❒ Shareholders ❒ [Equivalent]

❒ Communications: L shall explain the identity of the client where she *knows or should know* that the organization’s interests are adverse to those of the constituents.

In *In Re Grand Jury Subpoena* (542), it was enough that the lawyers gave *Upjohn* warnings, and said, “we can represent you if no conflict arises.” Thus there was no AC privilege between lawyers and constituent.

❒ Confidentiality: When a constituent communicates with L ***in that person’s organizational capacity***, the communication is protected by Rule 1.6. (¶2).

❒ Representation: L may also represent constituents, subject to Rule 1.7. If consent is required, it may be given by appropriate official, other than the official to be represented. It is not clear that L could defend the organization in a derivative action. (*See* ¶14).

**Corporate Attorney-Client Privilege**

❒ Mergers: The privilege may be transferred in an acquisition, but the merger documents might stay with the old client (*Tekni-Plex*, 540-41).

❒ Constituents: The party wishing to suppress must prove the privilege. (*Ruehle*).

**Factors**: (1) where legal advice of any kind is sought (2) from a professional legal adviser in his capacity, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his insistence permanently protected (7) from disclosure by himself or by the adviser, (8) unless the protection be waived.

*Matter of Bevill* places a **five-part burden for personal capacity:** (1) approached counsel for legal advice; (2) they made it clear that they were seeking legal advice in their individual rather than representative capacities; (3) counsel saw fit to communicate; (4) communications were confidential; (5) substance of their conversations did not concern matters within the company. (549).

# 11. Quality Control and Advertising

## A. Advertising

941-948

**7.3 Direct Contact with Prospective Clients**

* (a) shall not solicit in person, telephone, etc., when significant motive is pecuniary gain (ha) unless person is also a L or close friend, family, etc.
* (b) Can’t do it if person said don’t want to be contacted, or is coercive
  + [5] if no response after sending communication, further efforts may violate 7.3(b)
* All solicitations must have words “Advertising Material” on outside envelope
* But L may participate w/ group legal service plan that contacts ppl directly to solicit membership
* [1] potential for abuse inherent in direct contact: influence, intimidation, overreaching
* [3] risk is larger than print ads bc no oppty for 3P scrutiny
* *I Need to Make Contact* (941-48): SCOTUS case allows direct contact by eg ACLU if main purpose is to effect change in public policy through impact lit (1am implications), rather than $

**7.4 Communication of Fields of Practice and Specialization**

* Don’t say or imply you’re a certified specialist if you’re not certified by appropriate body
* [1] can say generally that you’re a “specialist” in a particular area of law

## B. Control of Quality: Reducing the Likelihood of Professional Failure

660-699

Catchall rules broadly define professional misconduct & require reporting of substantial violations

**5.1 Responsibilities of Partners, Managers & Supervisory Lawyers**

* (a) supervisory Ls responsible for others’ compliance w/ rules
* (b) L shall be responsible for violation if (1) L orders or knowingly ratifies, or (2) is a partner/has managerial authority, and knows of conduct at time when consequences can be avoided or mitigated but fails to take such action
* [2] establish policies & procedures to ensure compliance
* [3] requirements & level of formality of procedures depends on size & nature of firm
* [7] apart from this and 8.4(a), not responsible for actions of others under Rules, but may be under substantive law

**5.2 Responsibilities of a Subordinate Lawyer**

* (a) responsible for rules despite following directions
  + [1] fact may be relevant to requisite K to punish for violation of rules
* (b) safe harbor if question was arguable
  + [2] when there’s a question, supervisor can take responsibility

**5.3 Responsibilities Regarding Nonlawyer Assistants**

* (a) managerial Ls should make sure nonlawyer’s conduct is compatible w/ obligations of lawyers
* (b) L w/ direct supervisory authority “”
* (c) L shall be responsible if (1) orders or ratifies conduct or (2) is supervisor and knows about and could mitigate but doesn’t
* [1] take account of lack of lawyer training and no disciplinary authority

**5.4 Professional Independence of a Lawyer**

* (a) L shall not share fees w/ nonlawyer except:
  + (1) agreement w/ firm to pay L’s estate etc. on L’s death
  + (2) purchase of practice of dead, missing, disabled L: share w/ estate
  + (3) nonlawyer employees in compensation/retirement plan
  + (4) court awarded legal fees w/ nonprofit that retained, etc.
* (b) no partnership w/ nonlawyer if practice law
* (c) Person who refers or pays L to represent another cannot direct or regulate L’s judgment
* (d) L shall no practice w/ or in form of professional corporation or association for profit if
  + (1) nonlawyer owns any interest therein except estate of dead L
  + (2) nonL is corporate director
  + (3) nonL has right to direct or control professional judgment of L

**5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law**

* (a)-(b) Ls shall not practice law in violation of a jurisdiction’s rules; establish a systematic & continuous presence in the jx for practice of law, hold out to public to be a L admitted in that jx
* (c) L may provide temporary services in jx that
  + (1) are in association w/ a L who is admitted
    - [8] client interests are protected this way; but L must actively participate in & share responsibility for representation
  + (2) are reasonably related to pending/potential proceeding if L is authorized to appear in that proceeding or reasonably expects to be auth’d
    - [10] meetings w/ client, W interviews, doc review. L admitted in F1 only can prep for appearance in F2 by taking depos etc. in F3
    - [11] also permits Ls associated w/ L who expects to be admitted PHV to do stuff
  + (3) reasonably related to arbitration, mediation, or other ADR arising out of L’s home practice and are not services for which jx requires pro hac vice (PHV) admission
    - [12] if court rules or law so require, must get PHV for arbitration etc.
  + (4) not w/in (2) or (3) and reasonably related to L’s home practice
    - [5] this list is not exhaustive
    - [14] necessary relationship when C’s issues are multijurisdictional. Look to Model Court Rule if want to provide pro bono after disaster when not otherwise auth’d to practice law in that jx
* (d) may provide services that
  + (1) are provided to L’s employer/org affiliates and are not svcs for which jx reqs PHV, or
  + (2) are svcs that L is auth’d by fed or other law to provide in the jx
  + [16] doesn’t apply to personal legal services for officers or employees; just representation of the organization
  + [17] may be req’d by substantive law to register
* [2]-[3] may employ or assist paraprofessionals

**5.6 Restrictions on Right to Practice**

* L shall not participate in offering/making partnership, shareholders, settlement agreement, etc., that restricts a L in practice after termination of the relationship/upon settlement
* [3] excludes sale of law practice under 1.17

**8.4 Misconduct**

* (a) prof’l misconduct for L to violate or attempt to violate rules, induce another to do so
* (b) commit criminal act that reflects adversely on honesty, fitness, etc.
* (c) conduct involving dishonesty, fraud, deceit, misrepresentation
* (d) conduct prejudicial to administration of justice
  + [3] L stating bias in course of representation commits misconduct under (d)
* (e) state or imply ability to influence gov agency
* (f) knowingly assist judge/judicial officer in violation of applicable rules
* [2] L should be professionally answerable only for those offenses that indicate lack of characteristics relevant to law practice: violence, dishonesty, breach of trust, interference w/ admin of justice, etc.
* [4] L may refuse compliance w/ obligation upon good faith belief of its invalidity. 1.2(d)
* [5] Ls in public office have greater legal responsibilities

**8.3 Reporting Professional Misconduct**

* (a) **required reporting** to prof’l authority when another L has committed violation of Rules that raises substantial Q as to honesty, trustworthiness, or fitness as a L
* i.e. firm can’t rely on internal discipline
* (b) same for L who knows a judge has committed such a violation
* (c) doesn’t req disclosure protected by 1.6 or info gathered by L/judge while participating in approved lawyers assistance program
* [2] L should encourage C to consent to disclosure where C’s interests not substantially prejudiced
* [3] some judgment involved—need not report every minute violation. Substantial = seriousness of offense, not quantum of evidence
* [4] when L is retained to rep a lawyer whose professional conduct is in question, C-L relationship rules govern
* [5] w/o some confidentiality in assistance programs, Ls might not want to go

**8.5 Choice of Law**

* Disciplinary Authority: (a) L who practices in jx is subject to disciplinary authority of this jx
* Choice of Law: (b) rules of tribunal apply for pending matter; for any other conduct the rules of the location of the conduct or the location of predominant effect will apply
* [5] safe harbor if L’s conduct conformed to rules of SOME jx in which L reasonably believed predominant effect would occur
* [6] If 2 jxs proceed against same L for same conduct, should identify same governing ethics rules and make sure they apply same rule to same conduct and don’t apply 2 diff laws to conduct
* [7] choice of law applies to transnational work unless treaties etc. exist

*Notes*

* Leis v. Flynt (1979)
  + L has no property right in being admitted pro hac vice
  + Courts can do whatever they want in this area—often have to have local counsel
* California’s batshit rule: Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Ct. (1998)
  + Arbitration—NY Ls traveled to Cal a few times to see Cs
  + Fee agreement unenforceable bc unlawful practice in Cal
  + Physical presence a factor but not necessary or exclusive?!
  + Now statutory carveout for arbitration in CA, can admit PHV
* Why do we care where lawyers practice?
  + Quality control; want them subject to disciplinary rules
  + Protectionism

1. *State ex rel. Fiedler v. Wis. Senate* (statutory CLE requirement); *Gmerek v. State Ethics Comm’n* (regulations on lobbyists is inapplicable to lawyers who lobby. *But see* the bottom of page 20 for **counter-examples**. [↑](#footnote-ref-1)
2. A lawyer may condition conversations with a prospective client on informed consent that no information released will prohibit the lawyer from representing a different client. Comment 5. [↑](#footnote-ref-2)
3. Rule 1.13, ¶2 makes clear that when a constituent of an organizational client communicates with a lawyer in that person’s organizational capacity, the communication is protected by Rule 1.6. [↑](#footnote-ref-3)
4. There are a few exceptions. Employed lawyers may enjoy the protections of antidiscrimination law. *Tranello v. Fray* (2d Cir.). It is rarer for retained lawyers to be protected. *But see Mass v. McClenahan* (SDNY) (page 103). [↑](#footnote-ref-4)
5. *Comment ¶5*: May include communications on behalf of a client exercising a right to communicate with the government, or investigative activities of government lawyers prior to commencement of an action. [↑](#footnote-ref-5)
6. “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. [↑](#footnote-ref-6)
7. **Tribunal:** See Rule 1.0 for the definition of a tribunal. The Rule also applies to “ancillary proceedings,” such as a deposition. (¶1). The duty of candor extends to arguments of **law** as well as fact (¶4), but the lawyer generally does not have to personally know of matters in the pleadings (¶3). [↑](#footnote-ref-7)