**Professional Responsibility – On the one hand … but, on the other hand ….**

**Chapter One: Where do Ethics Rules Come From?**

**I – The Attorney-Client Relationship**

1. The client is the center of the universe, if not the whole universe
   1. So long as the means and end are lawful, lawyers should have no qualms over whether they are fair to others. Lawyers should act as their clients would if they had the legal training
2. Lawyers and the legal profession also deserve autonomy
3. **The Bad Client Problem**:The rules governing lawyers must permit, perhaps even require, lawyers to protect the victims of a client's ongoing illegal conduct, even if that harms the client
4. **The tempted lawyer problem**:Since client trust is crucial in enabling lawyers to pursue their clients' goals, the rules and law governing lawyers should forbid lawyers (absent client consent) ever to occupy positions in which the risk of betrayal is too high
5. **The Poor Lawyer Problem**: Not all lawyers are above average
6. **The Justice and Fairness Model**
   1. The law should pay heed to both justice and fairness
   2. Lawyers are intermediaries between law on paper and its application to problems of clients
   3. We don't want justice and fairness to get lost in translation
7. **The Professional Conspiracy Theory**
   1. This theory posits that legal ethics rules exist mainly to protect the interests of lawyers and to impede what, in their absence, would be legislative control of the bar.
      1. Lawyers interests are protected by the bar. Judges are just lawyers in robes
   2. It is necessary, for each rule studied, to ask:
      1. Whether the rule serves a useful purpose; and
      2. Whether that purpose is mostly or only useful to the bar
8. **The 'In Service of Other Theories' Theory**
   1. The proper content of any ethical rule should respond to theories developed in other areas of legal and jurisprudential study. The ethics rules can then adapt themselves as appropriate to serve different theories
9. **Who Makes the Rules?**
   1. Sixth amendment guarantees effective assistance of counsel in criminal cases
   2. Fifth amendment's "takings" clause has surfaced in connection with state plans that require lawyers to put certain escrow funds into interest-bearing accounts, with the interest going to the state to fund legal services for populations in need
   3. Article IV privileges and immunities clause: has been cited to invalidate law impeding the ability of lawyers who reside in one state to gain bar admission in another
   4. Due Process Clause can force a judge to recuse themselves from a case
   5. Every state in the US except CA has adopted the current version of the ABA recommended professional conduct rules (however no two jurisdictions have an identical set of rules)
   6. Usually you can’t use a violation of a Rule as a basis for legal recovery, but it can be some evidence of a violation of a legal duty
      1. Where ABA and State rule conflict 🡪 State law controls
10. **Courts vs. Legislators**
    1. Negative inherent power: used to invalidate laws that regulate lawyers, even when these are consistent with the court's rules
       1. One effect of this is to prevent popular attempts (via legislation) to control the conduct of lawyers
       2. ***State ex rel. Fiedler v. Wisconsin Senate* (1990)**: struck down a law that imposed a continuing legal education requirement on attorneys who wished to be appointed as guardians ad litem
          1. **Holding**: once an attorney has been determined to have met the legislative and judicial threshold requirements and is admitted to practice law, he or she is subject to the judiciary's inherent and exclusive authority to regulate the practice of law
       3. ***Irwin v. Sturdyk's Liquor* (1999)**: held that statutorily imposed limitations on attorney's fee awards violated separation of powers
       4. ***Preston v. Stoops* (2008)**: refused to apply deceptive trade practices law to out-of-state lawyers because any action by the General Assembly to control the practice of law would be a violation of the separation of powers doctrine
       5. Other side of decisions
       6. ***Crowe v. Tull* (2006)**: held that the state's consumer protection law could be used to sue lawyers for false advertising
11. **Congress**
    1. The federal government can regulate lawyers notwithstanding the tradition of state regulation
       1. Ex: SOX allows SEC to regulate lawyers who appear or practice before the SEC
12. **Rules of Professional Conduct**
    1. Professional conduct rules and cases construing them are a primary source of lawyer regulation
    2. ABA - dominant influence 🡪 Model Rules of Professional Conduct
       1. But, before any rule can actually govern a lawyer's behavior, a court must adopt it
          1. Courts often defer to ABA decision, but less so lately
          2. The bar is still very much a self-governing institution and is likely to remain so
13. **A Brief History**
    1. Watergate was start of heavy emphasis on ethics and requiring ethics courses at ABA schools
    2. 2002 Task Force on Corporate Responsibility: SOX
14. **Why is There such a Focus on what it means to be a Professional?**
    1. Advent of lawyer advertising gave impression lawyers were focused solely on making money
    2. As lawyers flooded the market, needed to remind them that they are part of an elite club

**Professional Responsibility: The 1.5% Solution**

1. Professor Gillers takes issue with the fact that the committee is asking NYU to significantly reduce required instruction in professional responsibility to the bare minimum
2. The committee wanted to integrate professional responsibility into the lawyering and clinical courses instead of making it a separate course
3. Gillers says that the school should debate and decide what is institutionally and pedagogically right for the school and our students and do that

**Eat Your Spinach!**

1. Article by Gillers on teaching professional responsibility and legal ethics
2. Why is legal ethics the most important class?
   1. Legal ethics is the only class in law school curriculum whose content is relevant to the daily professional life of all graduates who practice law
3. Class approach
   1. Start by focusing on the facts, the client, the client’s problem
   2. Compare intuition with the requirements of the rules and case holding (positive law)
   3. We then critique positive law especially, where it diverges from our intuition
      1. This critique will take us into greater abstraction as we attempt to identify and defend governing principles for the problem at hand, then where else these principles may lead

**Part One: The Attorney-Client Relationship**

**II - Defining the Attorney-Client Relationship**

1. **Is There a Client Here?**
   1. What makes someone a client is determined by caselaw, not rules
   2. The attorney-client relationship is formed when:
      1. A person manifests to a lawyer the person’s intent that the lawyer provide legal services for the person; **and**
      2. The lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide services
   3. Court assignment is another way to establish the attorney-client relationship
   4. Money need not change hands to create an attorney-client relationship. A lawyer can be paid by a first person to represent a second person, in which case the second person is the client
   5. ***Analytica Inc.*** *–* company wanted to give employee stock as reward for good service. Company gave financial information to a law firm that the employee had hired for tax advice on the transaction. On a motion to disqualify the firm in a case it later brought against the company, the court said the company had been a client even though it had not itself retained the firm
   6. ***Barton*** – a professional relationship can arise via law firm’s website
      1. When a lawyer considers a representation to have ended, she should inform the client that she no longer is a client if there is a reasonable chance that the client may believe the representation is continuing
   7. ***Bennett*** – relationship is ongoing unless and until the client understands, or reasonably should understand, that he can no longer depend on it. Even when an attorney-client relationship is established, it almost always has a finite scope
2. **What do Lawyers owe Clients?**
   1. **Competence**
      1. Incompetence has many parents: Ignorance, inexperience, neglect, lack of time
      2. Incompetence is often the basis for malpractice, if it causes damage, or for an “ineffective assistance of counsel” claim under the Sixth Amendment
      3. Lawyers holding themselves out as specialists may be subject to higher standard of care
   2. **Confidentiality**
      1. ***In Re Holley***: reporter called a law firm to get a copy of a compliant faxed to her. Firm faxes it to her, but complaint was under seal. Firm publicly released a document that his client wanted protected and the court had put under seal. Holley didn’t know the document was under seal, and the face of the copy of the complaint didn’t say anything. Court censured Holley, said that even if the document were public, they would have censured him.
      2. ***Matter of Anonymous***: even if the information that your client tells you is known to others, it’s still confidential. Lawyer was reprimanded for revealing former divorce client’s communications, even though they had been revealed to others and they could have been found.
         1. When you repeat what your client says to you, you are giving it a level of credibility it may not otherwise enjoy
      3. **60 Minutes Video – Logan**: two lawyers knew their client committed murder that someone else was in jail for, but can’t come forward until after their client dies
         1. **Rule 1.6(b)**: a lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent reasonably certain death or substantial bodily harm
         2. **Possible solution 🡪 “taint teams”**: place buffer team between DA + lawyer and have them do their own independent investigation
3. **Privileged Information and Ethically Protected Information: What’s the Difference?**
   1. **Unenacted Federal Rule of Evidence 503**
      1. A communication is “confidential” if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication
      2. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:
         1. Between himself or his representative and his lawyer and the lawyer’s representative, or
         2. Between his lawyer and the lawyer’s representative, or
         3. By him or his lawyer to a lawyer representing another in a matter of common interest, or
         4. Between representative of the client or between the client and a representative of the client, or
         5. Between lawyers representing the client
      3. The privilege is a shield, it allows a lawyer and client to refuse to disclose a confidential communication despite a subpoena
         1. A subpoena can reach information that is confidential but not privileged
         2. The refusal cannot lead to contempt of court
         3. No privilege will protect lawyer-client communications if a stranger is present during or given access to it
      4. Ethical Duty: forbids revelation and use of a client’s information absent an exception
      5. Privilege: entitles a lawyer and client to refuse to reveal communications between them
      6. The obligation of an attorney not to misuse information acquired in the course of representation serves to vindicate the trust and reliance that clients place in their attorneys
4. **Policies Behind the Privilege and Confidentiality Rules**
   1. **Empirical**: Privilege and confidentiality rules will encourage the client to trust her lawyer and provide information and sources of information, allowing the lawyer to do a better job
      1. **Problems with this argument**: based on an intuition about how people will behave without a rigorous test of whether or not this is true. Doesn’t work well for confidential but unprivileged communication with third parties the lawyer discovers on her own
   2. **Normative**: lawyers should respect the clients’ confidence because it is the right thing to do. The client should be in control of information about her legal matter, except as she explicitly delegates that control to enable a lawyer to protect her interests
   3. **Professional Identity**: many lawyers view the confidentiality rules as closely tied to how they see themselves as professionals
5. ***Perez v. Kirk & Carrigan*** [preface: defining the attorney-client relationship, what do lawyers owe clients?] TX COA
   1. **Facts**: π was a truck driver who collided with a school bus and killed children. Lawyers for other side visited him in hospital and told π that they were his lawyers as well, so π gave lawyers a sworn statement about the accident, which lawyer turned over to the DA, π was indicted
   2. **Law**: a lawyer may breach his fiduciary duty to his client either by wrongfully disclosing a privileged statement or by disclosing an unprivileged statement after wrongfully representing that it would be kept confidential
   3. **Holding**: reversed, attorney-client relationship was created when π believed that lawyers were his own lawyers as well and complied in offering a sworn statement
   4. **Reasoning**: an agreement to form an attorney-client relationship may be implied from the conduct of the parties. Relationship doesn’t depend on payment of a fee and may result from rendering services gratuitously
      1. The existence of the relationship encouraged π to trust the lawyers and gave rise to a corresponding duty on the part of the attorneys not to violate this position of trust. Once an attorney-client relationship arose between Δ and π, Δ had a fiduciary and ethical duty not to disseminate statements π made to them in confidence, regardless of whether the statements were privileged or not. The relationship between attorney and client requires absolute and perfect candor, openness and honesty, and the absence of any concealment or deception
   5. **Analysis**: It is important to note that much information that is ethically protected will not be privileged. However, virtually all information considered privileged under the Rules of Evidence will also be ethically protected. A lawyer whom a court orders to reveal information that is ethically protected but not privileged under the Rules of Evidence will be required to reveal the information under pain of contempt. But if that lawyer had voluntarily revealed the same information, he or she might be guilty of a disciplinary violation for failure to protect a client’s secrets or confidences, unless revelation was for one of the purposes recognized by Rule 1.6
6. **Entity Clients**
   1. A lawyer has the same confidentiality duties whether the client is a biological person or an entity
   2. **Whose Communications with Counsel are Privileged?**
      1. **Control Group test**: least protective of entity clients. The privilege protects only communications with those persons who actually run the company (“control group”)
      2. **Subject Matter test**: looks at the nature and purpose of the communication, not the identity of the source. Communications with both the CFO and the summer intern can be privileged
   3. ***Upjohn Co. v. United States*** [preface: defining the attorney-client relationship; what do lawyers owe clients? Government’s power to force a lawyer to reveal information that his client wants the lawyer to conceal]
      1. **Facts:** management had reason to believe that company subsidiaries may have made illegal payments to foreign government officials. Attorneys sent a questionnaire to employees worldwide seeking detailed information concerning the payments. The IRS subpoenaed the answers to the questionnaire and the records of the interviews. Upjohn resisted, citing attorney-client privilege
      2. **Law**: the attorney-client privilege between a corporation and its counsel extends to communications between counsel and noncontrol-level employees
      3. **Reasoning**: the attorney-client privilege exists largely because of recognition in the law that sound legal advice depends upon the lawyer being fully informed of relevant facts; if communications between a client and his counsel were discoverable, such communication would be largely circumscribed. In the context of a corporation, the information necessary for the corporation’s attorney to properly represent the corporation will not always come from the corporation’s “control group.” Often, the information will be in the possession of midlevel or even low-level employees. Communications between such employees and counsel may be no less necessary for proper representation, and therefore are no less deserving of confidentiality. Therefore, the privilege must be extended to all communications between counsel and corporate employees, no matter what level.
         1. The “Control Group” test adopted by the lower court frustrates the purpose of the attorney-client privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking the render legal advice to the client corporation. The attorney’s advice will often be more significant to noncontrol group members than to those who officially sanction the advice, and the control group test makes it more difficult to convey full and frank legal advice to the employees who will put into effect the client corporation’s policy
         2. If the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected
         3. Although it would be more convenient for the government to secure the results of the petitioner’s internal investigation by simply subpoenaing the questionnaires and notes taken by the attorney, such considerations of convenience do not overcome the policies served by the privilege
      4. **Analysis**: the attorney-client privilege protects communications only, not information. While an attorney may not be compelled to disclose what a corporate attorney communicated to him, the privilege does not bar the party seeking discovery from obtaining the information from the employee through a recognized discovery procedure such as a deposition. While it would be more convenient for the IRS to simply subpoena the notes taken by Δ’s attorney, the court notes that considerations of convenience do not overcome the policies served by the attorney-client privilege
      5. **Notes**: the goal of predictability is lost if states can do as they please (which they can). Clients will not know ahead of time whether issue will be in state or federal court (states don’t have to follow)
         1. One consequence of *Upjohn* is that companies are encouraged to place investigations that my produce incriminating information under the overarching authority of counsel, which increases the chance that it will be considered privileged.
         2. Courts have often upheld claims of privilege for purely factual investigations: clients often retain lawyers to perform investigative work because they want the benefit of a lawyer’s expertise and judgment
   4. ***Samaritan Foundation v. Goodfarb*** [preface: defining the attorney-client relationship – what do lawyers owe clients? This case identified a test somewhere between the “control group” and a “broad subject matter” test. Focuses on the privilege and government’s power (or lack of it) to force a lawyer to reveal information his client wants the lawyer to conceal]
      1. **Facts**: a lawyer representing a child in a medical negligence action against in a hospital made a discovery request for employee interview summaries prepared by the hospital paralegal at the request of the hospital’s corporate counsel, who argued that the interview summaries were protected under attorney-client privilege
      2. **Issue**: does the corporate attorney-client privilege apply to all corporate employee communications made to counsel?
      3. **Holding**: no, an employee’s communications to corporate counsel are within the corporation’s privilege only if they concern the employee’s own conduct within the scope of her employment and are made to assist the lawyer in assessing the legal consequences of that conduct for the corporation
      4. **Law**: an employee’s communications to corporate counsel are within the corporation’s privilege if they concern the employee’s own conduct within the scope of her employment and are made to assist the lawyer in assessing the legal consequences of that conduct for the corporation
         1. Communications initiated by an employee to corporate counsel seeking legal advice on behalf of the corporation are privileged, regardless of corporate hierarchy
      5. **Reasoning**: the statements made by the nurses and the scrub technician were not within the corporate attorney-client privilege because these employees were not seeking legal advice in confidence. Since their actions did not subject the Δ to potential liability, their statements were not gathered to assist the Δ in assessing or responding to the legal consequences of the speaker’s conduct. They were employee-witnesses, not employee-clients, therefore their statements are discoverable
         1. The employees weren’t seeking legal advice in confidence
         2. Although the employees were present during the operation, their actions didn’t expose the corporation to liability. It is fair to characterize the employee as a witness instead of a client
         3. Court read *Upjohn* narrowly 🡪 doctors/participants in procedure privileged, witnesses not privileged
         4. A problem with the control group framework is that the employee’s statements are the most important thing in enabling corporate counsel to assess the corporation’s legal exposure and formulate a legal response, which doesn’t have anything to do with whether the employee is a member of a control group
            1. Another problem is that it includes in the privilege the factual statements of control group employees even if they were mere witnesses to the events in question, while at the same time it fails to take into account the need to promote candor with respect to factual communications of non-control group employees whose conduct has exposed the corporation to possible adverse legal consequences
      6. **Analysis**: the purpose of the holding in this case is to provide courts with the means of determining which communications made by the corporation’s agents are those of the corporate client and not merely those of the individual speaker. While the corporate entity can only act through its agents, client communications cannot be identified simply as those of particular agents. By considering factors such as confidentiality and potential liability of the corporate client, the court seeks to avoid frustrating the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation
      7. **Note**: this case was overruled for civil cases (still okay for criminal cases)
7. **Exceptions to the Privilege or the Ethical Duty**
   1. Information that is confidential but not privileged, because the client is not the source, is subject to subpoena
   2. **Self-defense and legal claims**: rule 1.6(b)(5)
   3. **Collection of fees**: rule 1.6(b)(5)
   4. **Waiver**: rules 1.6(a), 1.8(b), 1.9. Clients can waive confidentiality
      1. May be explicit or implicit
         1. Waiver will be inferred when the client puts the confidential communication in issue in a litigation
         2. ***U.S. v. Bilzerian***: court upheld ruling that if a Δ in a securities fraud case were to testify to his “good faith” belief in the lawfulness of his conduct, he would thereby waive the privilege for communications from his former counsel tending to contradict him
      2. Revealing all of part of a confidential communication
      3. “limited waiver”: company shares privileged information with one party but then seeks to protect the same information in private litigation. Recognized by one circuit, rejected by others
   5. **To comply with other law**: if the law or a court requires disclosure, a lawyer cannot expect to set up an overriding confidentiality duty to avoid it
   6. **The crime-fraud exception to the privilege**: communications between clients and counsel are not privileged when the client has consulted the lawyer in order to further a crime or fraud, regardless of whether the crime or fraud is accomplished and even though the lawyer is unaware of the client’s purpose and does nothing to advance it
      1. In limited circumstances, the manner of conducting litigation can constitute a crime or fraud that would defeat the privilege (client directing attorney to make a large number of motions solely for the purpose of delaying the trial 🡪 would be discoverable)
      2. The crime-fraud exception does not apply simply because privileged communication would provide an adversary with evidence of a crime or fraud. instead, the exception applies only when the court determines that the client communication in question was itself in furtherance of the crime or fraud
      3. **Applying the exception**: *In Re Grand Jury Subpoena Duces Tecum*: the crime or fraud need not have occurred for the exception to be applicable; it need only have been the objective of the client’s communication. And the fraudulent nature of the objective need not be established definitively; there need only be presented a reasonable basis for believing that the objective was fraudulent.
      4. **In Camera Review**: SCOTUS has held that the trial court may review the allegedly privileged information *in camera* when deciding if the opponent of the privilege has met the burden of proving the crime-fraud exception
         1. ***Zolin* test:** Before engaging in *in camera* review to determine the applicability of the crime-fraud exception, the judge should require a showing of a factual basis adequate to support a good faith belief by a reasonable person that *in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies
         2. The threshold showing to obtain *in camera* review may be met using any relevant evidence, lawfully obtained, that has not been adjudicated to be privileged
      5. **The Effect of Confidentiality Exceptions on Privilege**: lawyer can reveal client’s plan to commit crime without waiving privilege, because crime-fraud exception applies to clients who seek out a lawyer to further a crime, not merely tell a lawyer that they are planning on committing one
   7. **Future Crimes or Frauds**: rule 1.6(b)(1) permits lawyers to reveal confidences to prevent death or substantial bodily harm, whoever is the actor and even if there is no crime
      1. Rule 1.6(b)(3) permits a lawyer to reveal confidential information to prevent, mitigate or rectify substantial financial harm that is reasonably certain to result or has resulted from a client’s crime or fraud in furtherance of which the client has used the lawyer’s services. Allows retrospective inquiry, greatly expanded scope of rule
   8. **Fiduciary Exception**: many courts hold that a beneficiary is entitled, on a proper showing, to communications between a fiduciary, like a trustee, and counsel for the fiduciary on the ground that the lawyer’s ultimate client is the beneficiary, not the fiduciary
   9. **Noisy Withdrawal**: when a lawyer must withdraw from representing a client because of a criminal or fraudulent behavior, the lawyer may be allowed, or to avoid assisting the fraud, legally obligated to alert others that she also retracts any oral or written representation that she may have made and which the client may still be using for the illegal purpose. Lawyer doesn’t say why.
   10. **Identity and fees**
       1. ***Reiserer***: court upheld a subpoena for lawyer records, even though the records could also reveal client names and their financial information and lead to investigation of the clients as well. There are a few exceptions to the general rule that client identity and fees are not privileged, however they are not very effective
   11. **Public Policy**: public policy alone has not been sufficient to warrant disclosure of privileged information
   12. **Is There a Professional Relationship?** 
       1. ***Georgia-Pacific v. GAF Roofing***: court denied privilege for the communications between an in-house lawyer and corporate officials. The lawyer’s communications on the business issues were heavily intertwined with his advice on the legal ramifications of proposed terms. Balancing everything, the court held that the lawyer was acting in a business capacity
8. **Agency**
   1. Lawyers are their clients’ agents. Lawyers have certain authority and certain duties within the scope of their agency. Agents are also fiduciaries. Acting for the client means that the lawyer’s conduct may be attributable to the client even if the lawyer makes a negligent mistake or willfully misbehaves
   2. **Scope**: to make sure the lawyer stays within their scope, important to define it in retainer. Can update this retainer over time as things change. This will also help protect the lawyer against a charge of neglect or malpractice
   3. ***Taylor v. Illinois*** [preface: agency] SCOTUS
      1. **Facts**: Δ was convicted after the court refused to allow him to call a witness because his defense lawyer had failed to provide the prosecutor with the name of the witness
      2. **Issue**: when a lawyer decides to forgo cross-examination, to not put certain witnesses on the stand, or to not disclose the identity of certain witnesses in advance of trial, must a client accept the consequences of the lawyer’s decision?
      3. **Holding**: yes.
      4. **Law**: the client must accept the consequences of the lawyer’s decision to forgo cross-examination, to not put certain witnesses on the stand, or to not disclose the identity of certain witnesses in advance of trial
      5. **Reasoning**: Δ has no right to disavow his lawyer’s decisions after the fact, absent ineffective assistance of counsel. In responding to discovery, the client has a duty to be candid and forthcoming with the lawyer, and when the lawyer responds, he speaks for the client
      6. **Analysis**: lawyers are their clients’ agents. As such, the lawyer must have full authority to manage the conduct of his client’s case because it would be impracticable to require client approval of every tactical decision a lawyer may make
   4. ***Bakery Machinery v. Traditional Baking*** [preface: agency] 7th Cir.
      1. **Facts**: the district court entered a default judgment against π after its attorney repeatedly missed filing dates and failed to respond to court orders. π argued that default judgment should be vacated because its attorneys had affirmatively deceived it about the litigation’s status
      2. **Law**: A client is held to its attorney’s conduct even where the attorney has affirmatively misled the client as to the status of litigation
      3. **Reasoning**: the type of equitable relief that π sought is extraordinary and only granted in exceptional circumstances. Such circumstances are not present in this case. Precedent provides that all of an attorney’s misconduct, except in cases of excusable neglect or conduct outside the scope of employment, is attributed to the client under agency principles. A lawyer who inexcusably neglects his client’s obligations does not present exceptional circumstances. Merely because π has a malpractice case against his lawyer does not justify prolonging the original case
      4. **Analysis**: the rationale for the rule in this case, making deception of a client the liability of the client’s attorney and not the client’s opponent, is to ensure that both clients and lawyers take care to comply with litigation responsibilities. If the lawyer’s neglect protected the client from liability or adverse consequences, neglect potentially would become pervasive. Since clients must be held accountable for their attorney’s actions, it does not matter where the actions falls between “mere negligence” and “gross misconduct.”
9. **Vicarious Admissions**
   1. A lawyer’s statements may be the vicarious admissions of a client and used against her
10. **Procedural Defaults**
    1. In criminal cases, an attorney’s failure to raise a Δ’s constitutional rights in compliance with valid state procedures will generally prevent the Δ from asserting those rights collaterally in federal court unless she can prove “actual innocence.” The default will be excused if it resulted because the lawyer abandoned the client.
       1. If the error is so serious as to amount to the ineffective assistance of counsel, the client will not be bound
11. **Confidentiality Duties in Agency Law**
    1. An agent has a duty not to use or communicate confidential information of the principal for the agent’s own purpose or those of a third party
    2. **Fiduciary**: lawyers cannot seek to take advantage of their client’s trust for personal gain or the benefit of others. They must place their clients’ interests above all other interests in the area of the representation and must treat their clients fairly
       1. **3 reasons for imposing fiduciary obligations on a lawyer after the professional relationship begins:**
          1. The client expects it
          2. The lawyer may have acquired information about the client that gives her an unfair advantage in dealings with the client
          3. Many clients will not be in a position to change attorneys, but rather will be financially or psychologically dependent on the attorney’s continued representation.
    3. **Loyalty and Diligence**: subset of fiduciary duty, the duty of loyalty requires the lawyer to pursue, and to be free to pursue, the client’s objectives unfettered by conflicting responsibilities or interests. A loyalty duty (like the duty of confidentiality) survives the termination of the attorney-client relationship and prevents a lawyer from acting “adversely” to a former client in matters “substantially related” to the former representation.
12. **The Duty to Inform and Advise**
    1. ***Nichols v. Keller*** [preface: appeal from summary judgment dismissing malpractice action] CA COA
       1. **Facts**: Δ contended that they had not been obligated to advise client π of his civil suit remedies following a work-related injury because they represented him only on his workers’ compensation claim
       2. **Law**: an attorney may be obligated to alert a client to legal remedies outside the direct scope of that attorney’s representation of the client
       3. **Reasoning**: one of the attorney’s basic functions is to advise. Advice need not be on every possible alternative, but should cover all foreseeable negative consequences. If such a consequence is foreseeable even in an area outside of the attorney’s scope of representation, the attorney is still under a duty to disclose the risk. He can then advise the client that it is outside his expertise and/or scope of representation and that the client should seek other counsel, and then the onus is placed on the client to protect his rights. π should have been advised that civil remedy existed.
       4. **Analysis**: when in doubt, disclose
          1. If prudence dictates that a claim beyond the scope of the retention agreement be pursued, the client can then consider whether to expand the retention or pursue the additional claim in some other manner
    2. **In a box** 🡪 **Rule 1.8**  seems to allow for a cautionary “don’t do this deal, but I can’t tell you why”
       1. Also, informed consent can be very hard to get in some cases
    3. **The Client’s Right to Know**
       1. Lawyers have a duty to communicate even unreasonable settlement offers to their clients
       2. In criminal cases, failure to inform can lead to a finding of ineffective assistance of counsel
       3. ***Boria v. Keane***: defense lawyer presented client with plea deal but offered no advice on whether to take it or not, even though lawyer felt very strongly that Δ had no choice but to take it. Δ didn’t take plea, was convicted. Court held constitutionally ineffective assistance of counsel
       4. **Rule 1.2(a)**: in civil matters, whether to settle is a decision for the client, and in criminal matters, the client has the right to decide whether to testify, accept a plea, and whether to waive a jury trial. Ordinarily, a lawyer is entitled to choose the strategies and legal theories he will employ to achieve the client’s goals
13. **Autonomy of Attorneys and Clients**
    1. **The Lawyer’s Autonomy**
       1. ***Jones v. Barnes*** [preface: autonomy of attorneys and clients]
          1. **Facts**: convicted criminal contended that he had an absolute right to have his public defender on appeal raise every nonfrivolous issue he requested. Criminal contended that his attorney’s refusal constituted a denial of his Sixth Amendment right to counsel.
          2. **Law**: an attorney representing a Δ on appeal is not under a duty to raise every nonfrivolous issue requested by the Δ
          3. **Reasoning**: counsel is in a better position than Δ to assess how best to prosecute an appeal. Raising every possible issue can be a bad strategy because it can lead to drowning out stronger claims with weaker ones. To create a per se rule that a Δ is entitled to have appointed counsel raise every issue he wishes would seriously undermine the ability of counsel to present the client’s case in accord with counsel’s professional judgment.
          4. **Analysis**: constitutional case. Court simply held that, as a matter of federal constitutional law, no right to press all issues on appeal belongs to one having appointed counsel
       2. **The Scope of the Lawyer’s Autonomy**:
          1. **Rule 3.3(a)(3)**: permits a lawyer to decline to offer evidence (other than the testimony of a criminal Δ) that the lawyer reasonably believes is false
          2. **Rule 1.2(c)**: lawyer has discretion to limit the scope of the representation if the client consents and the limitation is reasonable under the circumstances.
    2. **The Client’s Autonomy**
       1. ***Olfe v. Gordon*** [preface: autonomy of clients]
          1. **Facts**: π retained Δ to handle sale of her house. π told Δ that she would take out first but not second mortgage. Δ arranged sale with second mortgage but told π it was a first mortgage. Purchaser defaulted, π lost money as a result
          2. **Law**: when an attorney disregards a client’s instructions to the client’s detriment, expert testimony is not required for the client to recover
          3. **Reasoning**: It has generally been recognized that an attorney may be liable for all losses caused by his failure to follow with reasonable promptness and care the explicit instructions of his client. A lay jury is perfectly capable of understanding on its own whether an attorney failed to follow instructions
       2. **The Scope of the Client’s Autonomy**
          1. If a Δ insists on testifying, counsel must accede
          2. An accused has the right to choose to accept a plea offer even over his lawyer’s strenuous objection
          3. **Clients with Diminished Capacity**: courts often distinguish between a guardian ad litem and counsel
             1. **Counsel**: zealous advocate for the wishes of the client
             2. **Guardian Ad-Litem**: evaluates for themselves what is in the best interest of the client-ward and then represents the client-ward in accordance with that judgment
             3. **Guidelines for Assisting an Incompetent**: a declaration of incompetence does not deprive a developmentally-disabled person of the right to make all decisions. The primary duty of the attorney for such a person is to protect that person’s rights, including the right to make decisions on specific matters. If a conflict between the client’s preferences and best interests emerges, the attorney should inform the court of the possible need for a guardian ad litem
    3. **Terminating the Relationship**
       1. **Termination by the Client**: In general, clients may fire their lawyers at any time for any reason.
          1. Indigent criminal Δ’s may not fire their lawyers who have been appointed to represent them, although they may ask the court to assign a new lawyer or may choose to represent themselves
          2. A client might not be able to fire their retained lawyer close to or during a trial. By then, the interest of others in not delaying trial will be given substantial weight
          3. **Rule 1.16(c)**: when a matter is in litigation, a lawyer must comply with the withdrawal requirements of the particular tribunal
          4. When a professional relationship ends (regardless of how), the client is presumptively entitled to the entire file on the represented matter
             1. Subject to narrow exceptions
       2. **Termination by the Lawyer**: leaving a client without a good reason can be characterized as abandonment, which is disloyal and has consequences
          1. **Rule 1.16**: governs lawyer’s ability to terminate a professional relationship
          2. Withdrawal counts as abandonment 🡪 lawyer not entitled to contingent fees
          3. Lawyers can withdraw if clients are seriously delinquent in paying fees
       3. **Termination by Drift**: the representation ends when the work ends, but determining the exact point is difficult
          1. ***Barnes v. Turner***: lawyer had a duty to renew client’s security interest 5 years after representation ended if lawyer failed to advise client of need for renewal at the end of 5 years
          2. **Episodic Clients**: courts have held that a client who retains a lawyer a few times a year for multiple years can reasonably expect the professional relationship to extend to the periods in between retention

**III – Protecting the Attorney-Client Relationship Against Invasion**

1. **Communicating with Another Lawyer’s Clients**
   1. **Rule 4.2**: In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or court order. The following conditions apply:
      1. The communication must occur while the lawyer is representing a client on the matter. A lawyer who is not acting in a representative capacity is not foreclosed by this rule from talking to another lawyer’s client about the matter on which the other lawyer is representing the client
         1. A client dissatisfied with his lawyer’s performance can get a second opinion
      2. The communicating lawyer must know that the person with whom she is communicating is represented by another lawyer on the subject of the communication
         1. Knowledge may be inferred from the circumstances, can’t plead ignorance
      3. Members of an uncertified class are not represented by counsel so the lawyers on either side of the matter may contact them consistent with rules on solicitation and unless the court orders otherwise
      4. The communicating lawyer is only forbidden to communicate about the subject of the representation. She may communicate about anything else
      5. The prohibition doesn’t apply if the other lawyer consents to the communication or if it is authorized by law or a court order
      6. “Communication” is forbidden. Videotaping employees of an opposing company going about their activities in what those employees believe is the normal course is allowed
      7. **Rule 8.4(a)**: a violation occurs if a lawyer engages in a forbidden communication through a third party, such as an investigator or even the lawyer’s own client
         1. However, clients are free to talk to each other
         2. **Exceptions**: the rules prevent a lawyer from:
            1. Getting a damaging admission from the opposing client
            2. Learning a fact or getting a document she would not learn or get if counsel were present
            3. Settling or winning a concession or learning the client’s true position in a negotiation
            4. Learning the client’s strategy or gaining information protected by the attorney-client privilege or the work-product doctrine
            5. Weakening the opposing client’s resolve by casting doubt on the strength of his position; and
            6. Disparaging the opposing lawyer to the client
      8. **Civil Matters**: **Rule 4.2** **(no contact rule)** presents different issues depending on whether the opposing client is a person or an entity
         1. **Person**: key question will be whether the communication was a “communication” within the meaning of the rule, but there should be no difficulty identifying the client
         2. **Entity**: if the opponent is a corporation, the government, a partnership, or any other legal entity, need to figure out if person is protected and unable to be contacted
         3. ***Niesig v. Team I***: [preface: communicating with another lawyer’s clients – civil matters. This case construed the Code equivalent to **Rule 4.2**, which is substantively the same]
            1. **Facts**: π was injured on a construction site and sued various entities. Δ was his employer. π’s attorney wanted to conduct ex parte interviews with Δ employee-witnesses, moved court for order approving such action.
            2. **Law**: an attorney may conduct ex parte (for the benefit of only one party) interviews with a corporate adversary’s current employees if the employees do not have power to bind the corporation
            3. **Reasoning**: when opponents are corporations, the questions arises as to who will be considered a “party,” as a corporation can only act through individuals. As the code of professional responsibility is not a statute, it doesn’t have to be given effect. One interpretation urged, which is rejected, would hold all employees to be covered. This is unsatisfactory because it would preclude informal discovery, which is an expedient way of helping to resolve disputes. Another interpretation would be the “control group” test, which holds that only controlling individuals in a corporation (usually executives) would be covered by the rule. This rule wholly overlooks the fact that corporate employees other than senior management can speak for a corporation. The best rule is one that includes all persons who have authority to bind the corporation
            4. **Analysis**: the court here partially based its decision upon rules of evidence, although it didn’t specify the rules to which it was referring
         4. **How Large the Circle of Secrecy?**
            1. *Niesig* holds that the rule does not prohibit contact with former employees, regardless of their former status, so long as they are not represented by their own counsel. However, a lawyer must not seek to elicit privileged or confidential information from an opponent’s former employee
         5. **When the Government is the Adversary**
            1. In a suit against the government, the client is the United States, so a lawyer is free to speak to those involved in the case, however they have the right to refuse to speak to the lawyer. There is also a First Amendment right to petition the government.
            2. **ABA Opinion 97-408**: permits contact with officials who have authority to take or to recommend action in the matter, provided that the sole purpose of the lawyer’s communication is to address a policy issue, including settling the controversy. The lawyer must give government counsel reasonable advance notice of his intent to communicate with such officials, to afford an opportunity for consultation between government counsel and the officials on the advisability of their entertaining the communication
         6. **Testers** (some courts allow, have to look at specific facts of each case)
            1. Someone who pretends to be what they are not, for example sending two fake applicants, one white and one black, to apply for job at company who has just settled a discrimination dispute but which is rumored to still be discriminating. Employer is represented by counsel.
            2. **Pretexting**: developing false pretext to get information

Tough call whether this is allowed or not, because lawyers are forbidden to engage in deceit or misrepresentation **Rule 8.4**

However, some courts have upheld this practice, because the testers are often just acting as a normal member of the buying public, an accepted investigative technique

* + 1. **Criminal Matters: Rule 4.2 (no contact rule)**
       1. **Rule 4.2** applies in both civil and criminal matters
       2. **Sixth Amendment** right to counsel also applies in criminal cases and prohibits the state from questioning an accused person outside the presence of his counsel after “judicial proceedings have been initiated.”
       3. ***Hammad***: 2d Cir. held that the no contact rule limits prosecutorial conduct even before formal charge (prior to indictment, after suspect had retained counsel)
          1. Limited application of the rule to instances in which a suspect has retained counsel specifically for representation in conjunction with the criminal matter in which he is held suspect, and the government has knowledge of that fact (**Note**: unpopular opinion, not followed by most)
       4. ***Devillio***: government wired a co-Δ who got incriminating statements from Δ after his 6th Amendment rights had attached. Held that no-contact rule wasn’t violated, distinguished from *Hammad* because *Hammad* used a fake subpoena, which turned the informant into the prosecutor’s alter ego
       5. ***US. v. Carona*** [preface: protecting the attorney-client relationship against invasion – communicating with another lawyer’s clients]
          1. **Facts**: Δ was sheriff, accepted payments illegally from H, H was charged, agreed to cooperate as a plea. Δ was represented on the matter by counsel, and government was aware of this. H met with Δ while wearing wire to get incriminating statements on record, H couldn’t get enough information, so government produced fake subpoenas of certain illegal payment records from H. H met with Δ, Δ made statements indicating that payments had taken place and instructing H to lie to jury. Δ convicted of jury tampering, court allowed evidence to be used against Δ.
          2. **Holding**: No violation of the no-contact rule
          3. **Reasoning**: issue is decided on a case-by-case basis.

Fake subpoena didn’t make H the alter-ego of the prosecution any more so than he already was by agreeing to work with the prosecutor

Fake subpoena was a mere prop, long established that government may use deception in its investigations in order to induce suspects into making incriminating statements

* + - * 1. **Law**: prosecutors do not violate their ethical obligations by communicating pre-indictment with an attorney-represented Δ through a cooperating witness who uses falsified documents provided by the prosecution to obtain evidence from Δ
        2. **Analysis**: didn’t follow *Hammad* rule
      1. ***Taleo***: Government lawyers questioned employee of corporation that was under investigation. Corporation was represented by counsel, however employee was not individually represented by counsel, and didn’t want counsel to represent her. Once an employee makes known her desire to give truthful information about potential criminal activity she has witnessed, a clear conflict of interest exists between the employee and the corporation. Under these circumstances, corporate counsel cannot continue to represent both the employee and the corporation. Under these circumstances, because the corporation and the employee cannot share an attorney, ex parte contacts with the employee cannot be deemed to, in any way, affect the attorney-client relationship between the corporation and its counsel 🡪 no contact rule not violated

**Lawyers, Money, and the Ethics of Legal Fees**

* 1. **Examples**:
     1. **Market Fees, Unethical Fees, and Contingent Fees**
     2. **Court Ordered Fees**
     3. **Pro Bono: Requirements and Expectations**
  2. **In General**
     1. Lawyers are required to hold a client’s money in separate accounts (escrow/special)
     2. States require or permit lawyers whose clients do not direct otherwise to pool client money in a single account and to contribute the interest to a trust that is then used to fund legal help for individuals who cannot afford it
     3. *Brown*: court assumed that the state’s use of this money was a taking of the property under the Fifth Amendment, and therefore required “just compensation,” which the courts concluded was measured by the property owner’s loss rather than the government’s gain
  3. **The Role of the Marketplace**
     1. ***Brobeck v. Telex Corp*** [preface: ethics of legal fees – contingency fee. Looks at fee agreement as of day it was reached] 9th Cir.
        1. **Facts**: suit to recover $1M in attorney’s fees. Telex engaged Brobeck on contingency fee basis to prepare petition for certiorari. Prepared and filed, then Telex entered a “wash settlement” where both parties released their claims against the other.
        2. **Holding**: contract was not unconscionable, affirmed
        3. **Law**: a contingency fee of $1M for handing a writ of certiorari to the SCOTUS is not unconscionable
        4. **Reasoning**: unconscionable hardship is determined with reference to the time of contracting and doesn’t rely on hindsight. Although the minimum fee was high, Telex received substantial value from Brobeck’s services
     2. ***Green v. Nevers***: courts have broad authority to refuse to enforce contingent fee arrangements that award excessive fees
  4. **Time or Value (or does value = time)?**
     1. Hourly billing and flat fees are the most common billing types; flat fees are often hourly rates in disguise
     2. In some cases, lawyer fees can be more than award to π’s
        1. Ex: in a federal civil rights claims case, the federal fee shifting statute (allowed in these types of cases) allowed lawyers to get fee of $245K on $13K award for π’s

1. **Unethical Fees**
   1. **Rule 1.5(a)** limits the size of attorney’s fees
   2. ***In Re Laurence Fordham*** [preface: **Rule 1.5(a)** case – looks at what total fee turned out to be]
      1. **Facts**: father of accused drunk driver hired Δ to handle case, but later refused to pay the fee charged. π charged Δ with charging a clearly excessive fee.
      2. **Law**: in determining whether fees are clearly excessive, a court may examine the difficulty of the issues presented, the time and skill required to perform the legal service properly, and the fee customarily charged in the locality for comparable services
      3. **Reasoning**: the hearing committee’s and the board’s determinations that a clearly excessive fee was not charged were not warranted. The amount of time Δ spent to educate himself and represent his client was excessive despite his good faith and diligence. **Rule 1.5(a)** mandate, by referring to a lawyer of ordinary prudence, creates explicitly an objective standard by which attorney’s fees are to be judged. Dishonesty, bad faith or overreaching need not be established for discipline to be necessary. Claim that father entered into agreement with “open eyes” in terms of knowing that Δ didn’t have prior experience with DUI’s and thus would take longer wasn’t enough to prove that father knew how many hours project would take and total expense
      4. **Analysis**: the court in this case considered 8 factors to ascertain the reasonableness of the fee. The first factor required examining the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly. Another factor considered was the fee customarily charged in the locality for similar legal services
      5. ***Fordham* Guidepost**: if a fee is likely to be completely out of line with what competing lawyers generally charge for the same service, then even if you think it’s justified because of unusual factors, you should go out of your way to explain everything in great detail, in writing, including worst-case scenarios, and insist that client get independent counsel to advise on the fee. Even then, this might not be enough.
      6. **Brobeck vs. Fordham**:Brobeck looked at the fee agreement as of the day it was reached. Fordham looks back at what the total fee turned out to be. Other courts have done the same as Fordham and SG believes this would be the dominant view today (which doesn't mean the lawyer will necessarily lose). The two approaches cannot be reconciled: if a court adopts the Brobeck position, it necessarily (if it means it) negates the Fordham position. Maybe it doesn't mean it in all circumstances. Maybe the Brobeck court would say that all the ingredients for the fee were spelled out in the retainer and the possible fees could be predicted depending on the variables on that day, whereas in Fordham, it was not known or even anticipated how much time the work would take so the fee could not be known on the day of the agreement. And so, the Brobeck court might say, under those circumstances, a retrospective view would be appropriate. Of course, we can't know, but that would be one way partly to reconcile the opinions. Also, of course, Fordham was decided under a rule and Brobeck was decided under a very elastic state court standard.
   3. **Postretainer Fee Agreements**: when fee agreement is reached/modified after attorney-client relationship is formed, courts are especially strict in reviewing for fairness.
   4. **Inflating Bills**
      1. *Hess*: lawyer agreed to give client 15% discount if he paid his bills on time. Client didn’t pay bills on time, so lawyer started inflating his bills to compensate for fact that client wanted discount but never paid his bill on time. Court ruled for client, suspended lawyer for 3 years
2. **Contingent Fees**
   1. Usually agreements such as % of total award, however there can be % of amount saved client arrangements as well (reverse contingent fee)
   2. Often allow client to retain lawyer they could normally not afford without the benefit of an award or because client is unwilling to invest in their claim
   3. Whether a contingent fee is likely to be more favorable to the lawyer than an hourly fee ordinarily depends on five factors (which lawyer is in better position to estimate):
      1. The likelihood of the occurrence of the contingency (most important)
      2. When it is likely to occur
      3. The probable size of the recovery
      4. The amounts of work required, and
      5. The size of the lawyer’s % (influenced by lawyer’s estimation of other 4 factors)
   4. Lawyer may be entitled to a contingent fee that would be unconscionably high if it were a guaranteed fee
   5. **Rule 1.8(i)**: makes the contingent fee an exception to general prohibition against lawyer acquiring interest in the client’s claim
      1. However, courts are more willing to step in with contingency fee arrangements, partially due to perception that personal injury π’s are less sophisticated users of lawyers
   6. **Contingent Fees and Conflicts of Interest** 
      1. It will often be better for the lawyer, but not the client, to accept early offers and go on to the next matter because doing so maximizes hourly compensation with no risk
   7. **Prohibitions on Contingent Fees in Criminal and Matrimonial Cases**
      1. **Rule 1.5(d)**: contingent fees are prohibited in criminal cases, and there are substantial limits placed on contingent fees in domestic relations matters
      2. **Reasons for banning contingent fees in matrimonial matters**:
         1. The state has an interest in seeing as much money stay with the family as possible (especially for nonworking spouses and children)
         2. Since the law empowers the judge to order a wealthier spouse to pay the other spouse’s counsel fees, the less wealthy spouse does not need a contingent fee to be able to attract a lawyer
         3. A contingent fee gives the lawyer a stake in the outcome that might lead to a recommendation of a course of action not in the client’s best interests
      3. **Reasons for banning contingent fees in criminal cases**:
         1. A fee contingent on acquittal could prompt a lawyer to encourage the client to reject a favorable plea bargain and go to trial in order to give the lawyer a chance to secure the acquittal
         2. Convicted persons seeking to have their convictions overturned on grounds that their lawyer had been working on a contingent fee basis will usually fail
      4. **Brickman-O’Conell-Horowitz Possible Contingency Fee Rule**: If no offer made, rule inapplicable. If offer is made, contingency fee limited to 15% of offer. If offer is rejected, future contingency fee limited to 15% of rejected offer amount + normal contingency fees on excess
3. **Mandatory Pro Bono Plans**
   1. **Deborah Rhode – Culture of Commitment: Pro Bono for Lawyers and Law Students** (1999)
   2. **Jonathan Macey – Mandatory Pro Bono: Comfort for the Poor or Welfare for the Rich?** (1992)
   3. **Dennis Jacobs – Pro Bono and fun for Profit**

**Part Two: Conflicts of Interest**

**V. Concurrent Conflicts of Interest**

1. **Typology of Conflicts** (definition and context: a conflict of interest is involved if there is a substantial risk that the lawyer’s representation of the client would be materially and adversely affected by the lawyer’s own interests or by the lawyer’s duties to another current client, a former client, or a third person. Avoiding conflicts is crucial)
   1. **Conflicts from 10,000 feet**:
      1. Conflicts are:
         1. Fact specific: must get into the detail
         2. Literary: story with structure of “on the one hand …, but on the other hand….”
         3. Psychological: you will be assessing the temptation and a client’s conflict level
   2. Clients are entitled to undistracted lawyers
   3. Most conflicts don’t have a *mens rea* requirement: **absolute liability rules** (exception: imputed conflicts)
   4. **Remedies for Conflicts**:
      1. **Disqualification**
      2. **Malpractice**
   5. **Current Client Conflicts (concurrent conflicts) 🡪 Rule 1.7**
      1. Lawyer cannot represent A against B if lawyer represents B on entirely unrelated matter
      2. A lawyer may represent a city’s Hilton Hotel when a supplier sues it may also represent the city’s Sheraton on the same kind of claim
      3. Concurrent conflicts need not be between or among current clients. The lawyer might have personal interests that pose a loyalty threat:
         1. Lawyer whose spouse has a large stock investment in a corporation might not be able to represent π wishing to sue the corporation for a great sum
         2. Lawyer whose client wishes to challenge a tax regulation that provides a generous benefit for the lawyer may not be able to take the matter
   6. **Former Client Conflicts (successive conflicts) 🡪 Rule 1.9 (except government)**
      1. Can take case against former client if case is wholly unrelated to the prior work performed
   7. **Imputed Conflicts 🡪 Rules 1.10, 1.11, and 1.12**
      1. Imputed conflicts can be avoided by a lawyer who represented a former client while in a different law firm and has since changed firms if new firm erects a proper and timely screen (lateral lawyers only)
   8. **Government-Lawyer Conflicts 🡪 Rule 1.11**
      1. “Revolving Door” – Lawyers who work for government and move to private sector or leave private sector to work for government.
   9. **Lawyer-Witness Conflicts 🡪 Rule 3.7**
      1. Problem arises when lawyer for a client in litigation will or should be a witness, called either by client or the opposing side (advocate-witness rule)
      2. Ordinarily, lawyer can’t occupy both roles
   10. **Organizational Lawyer Conflicts 🡪 Rule 1.13**
       1. Lawyer represents entity and deals with entity through officers and employees. Conflict can arise when lawyer is deemed to represent both entity and its agents if their interests diverge
   11. **Conflicts in Conflict Rules 🡪 Rule 8.5**
       1. When a dispute touches more than one jurisdiction and their conflicts rules differ, a court must decide which rules will apply
   12. **Conflict Rules as Default Rules**
       1. Lawyers and clients may displace nearly all conflicts rules if the client gives **informed consent**. The rules are mostly default rules – what you get if you say nothing.
       2. Additionally, client may demand more protection against conflicts than the rules offer
2. **Client-Lawyer Conflicts**
   1. **Business Interests**
      1. ***In re Neville*** (1985) [preface: client-lawyer conflict]
         1. **Facts**: Attorney Neville (Δ) represented Bly (π), a licensed real estate broker, in certain real estate matters. Neville (Δ) also purchased options in certain of Bly’s (π) properties. Neville (Δ), Bly (π), and a third party then entered into a contract, drafted by Neville (Δ), under which one of the Bly (π) properties would go to Neville (Δ) in exchange for a promissory note. Bly (π) created the substantive terms, and Neville (Δ) accepted these terms with no negotiation. The Arizona Bar charged Neville (Δ) with violation of rule governing attorney-client business deals (DR 5-104)
         2. **Law**: Whenever lawyers knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client, the client must be given a reasonable opportunity to seek the advice of independent counsel
         3. **Reasoning**: In this case, Neville (Δ) was engaged in a business transaction in which his interests were adverse to those of his client, Bly (π), without giving Bly (π) a reasonable opportunity to seek the advice of independent counsel. DR 5-104 is applicable even in situations in which the attorney didn’t intend to defraud or act with improper motives. The application of DR 5-104 is not limited to those situations in which the lawyer is acting as counsel in the very transaction in which his interests are adverse to his client. It applies also to transactions in which, although the lawyer is not formally in an attorney-client relationship with the adverse party, it may fairly be said that because of other transactions, an ordinary person would look to the lawyer as a protector rather than as an adversary. Affirmed
         4. **Analysis**: the courts are very suspicious of business deals between attorneys and clients, a suspicion that led to the drafting of Rule 1.8(a) and DR 5-104(A). The courts scrutinize such transactions closely despite the fact that lawyers are provided no bright line by which to determine when they can act as ordinary businesspeople in relation to the interests of those whom they have represented in the past or whom they represent on other matters at present. The courts make it more difficult for lawyers to deal adversely with past and present clients because it is believed that this result conforms to the obligation of the profession and is in the public interest
      2. **A Lawyer’s Financial Interests**: A lawyer’s financial deals with a current client must comply with the substantive and procedural requirements of **Rule 1.8(a)**. A lawyer’s own interests may create a conflict with the client’s interests within the meaning of **Rule 1.7(a)(2)**.
      3. **Deals with Clients**: **Rule 1.8(a)** applies whenever lawyers knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client.
         1. *Greene*: a contract between an attorney and his client is not voidable at the will of the client, however the relationship between an attorney and his client is a fiduciary one and the attorney can’t take advantage of his superior knowledge and position.
            1. **Rule**: an attorney who seeks to avail himself of a contract made with his client, is bound to establish affirmatively that it was made by the client with full knowledge of all material circumstances known to the attorney, and was in every respect free from fraud on his part, or misconception on the party of the client, and that a reasonable use was made by the attorney of the confidence reposed in him

Courts have rejected defenses based on client’s sophistication level

* + 1. **Interests Adverse to Clients**: lawyer’s financial interests may create conflicts with a client’s interests even when there is no lawyer-client deal subject to **Rule 1.8(a)**.
       1. If the conflict involves a bribe or kickback, the honest services law remains a risk for lawyers (conspiracy to commit mail or wire fraud in example case)

1. **Client-Client Conflicts – Criminal Cases**

|  |  |  |
| --- | --- | --- |
| **Sixth Amendment Case Summary** | **If Δ shows** | **Then Δ obtains relief** |
| ***Holloway*** | Timely objection to multiple representation | **Automatic reversal**: no need to show prejudice or adverse effect |
| ***Cuyler v. Sullivan*** | Actual conflict/”actively representing conflicting interests” | Reversal if the conflict resulted in an adverse effect on lawyer’s performance |
| ***Strickland v. Washington*** | Counsel’s acts or omissions were outside the wide range of professionally competent assistance – not limited to representing conflicting interests | Reversal if there is reasonable probability that, but for counsel’s unprofessional errors, the result of the proceedings would have been different |

* 1. **Strickland Test for Ineffective Assistance of Counsel**:
     1. Was counsel’s performance reasonable considering all circumstances?
     2. It not 🡪 Δ must show that there was a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different
  2. **Criminal Cases (Defense Lawyers)**
     1. Issues of concurrent conflicts between clients in criminal representation arise when a single lawyer represents two or more Δ’s or persons under investigation
     2. ***Burger v. Kemp***: assumes partners are one lawyer for conflict purposes
     3. Δ’s have a 6th Amendment right to counsel of choice, however because ethical issues are intertwined with the 6th Amendment guarantee, the question whether counsel faced a conflict of interest is only part of a court’s analysis
  3. **Criminal Case Disqualification and the “Automatic Reversal” Debate**
     1. SCOTUS held that an erroneous denial of counsel of choice warrants automatic reversal, even if the Δ can show no other trial error
        1. The Constitution guarantees a fair trial through the Due Process Clause, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause
        2. The right at stake is the right to counsel of choice, not the right to a fair trial
  4. ***Cuyler v. Sullivan*** [preface: client-client conflicts – criminal cases] SCOTUS
     1. **Facts**: Δ had no money for lawyer, accepted lawyer that was representing his two co-Δ’s in a murder trial. Δ was tried first, separate from co-Δs. Lawyers presented no defense because they wanted to save their witnesses for the other two trials, Δ was convicted
     2. **Issue**: was Δ denied effective counsel under the 6th Amendment because his lawyers had a conflict of interest?
        1. Whether a state trial judge must inquire into the propriety of multiple representation even though no party lodges an objection
        2. Whether the mere possibility of a conflict of interest warrants the conclusion that the Δ was deprived of his right to counsel
     3. **Law**: the mere potential of a conflict of interest in representation is not sufficient to invalidate a conviction
     4. **Test**: must show that an actual conflict of interest adversely affected lawyer’s performance
  5. **Turning Conflicts into Sixth Amendment Claims after *Cuyler v. Sullivan***
  6. ***Holloway* Error**
     1. ***Holloway v. Arkansas*** (1978): dramatic opinion because it can lead to reversal of conviction without the need to show any harm at all or any effect on counsel’s performance. Trial court had appointed a public defender to represent three Δs in the same trial. The lawyer repeatedly requested separate counsel, citing conflicts of interest, but the trial judge refused to consider the request. SCOTUS held that the trial court’s failure to investigate the alleged conflicts required reversal without any need to demonstrate prejudice
     2. ***Mickens*** (2002) [preface: limits *Holloway*] : held that the automatic reversal rule operates only where defense counsel is forced to represent co-Δs over his timely objection, unless the trial court has determined that there is no conflict
  7. ***Wheat v. United States*** (1988) [preface: client-client conflicts – criminal cases]
     1. **Facts**: W (Δ) was indicted, along with 2 other Δs, for violation of federal narcotics laws. Shortly before his trial, W (Δ) requested that court allow him to substitute in as counsel lawyer who also represented other 2 Δs, who had pleaded guilty but whose plea bargains had not yet been accepted. Government (π) objected, contending that if the court elected not to permit other Δs plea bargains, W (Δ) would be called as witness at their subsequent trials. Government (π) argued that this would put lawyer in conflict among his clients. W (Δ) offered a waiver. Nonetheless, the court, finding strong probability of conflict, refused to allow lawyer to substitute in. W (Δ) was convicted, he appealed, contending he had been denied the right to counsel per the Sixth Amendment
     2. **Law**: if a trial court believes that representation of a Δ by an attorney presents a serious potential for conflict, the court may refuse to permit that representation, even in the face of a waiver
     3. **Reasoning**: The Sixth Amendment guarantees the right to effective counsel, not the right to counsel of choice. The guiding purpose behind the amendment is to ensure a fair trial. While this goal has been interpreted to create a presumption in favor of permitting a party to retain counsel of choice, if the exercise of such choice leads to the potential for a fair trial to be unlikely, this presumption must give way. The possibility of waiver doesn’t alter this conclusion. Courts have an interest in being sustained on appeal, and appellate courts can and do find waivers invalid in ineffective-assistance of counsel claims. The decision of whether to permit a representation that poses a threat of conflict is best made by the trial court, and nothing in the record here shows that the district court violated the standards
     4. **Analysis**: Wheat has provided effective means for prosecutors to ask judges to disqualify defense lawyers

1. **Client-Client Conflicts – Civil Cases**
   * 1. ***Fiandaca v. Cunningham*** [preface: client-client conflicts – civil cases]
        1. **Facts**: NHLA represented class of inmates in suit against state, state wanted to disqualify NHLA as π’s class counsel due to an unresolvable conflict of interest
        2. **Issue**: should the court have disqualified NHLA as π’s class counsel prior to the commencement of the trial?
        3. **Holding**: Yes, district court’s denial of the state’s pre-trial motion to disqualify NHLA was an abuse of discretion, reversed
        4. **Law**: At attorney may not represent two clients when a settlement offer made to one is contrary to the interests of the other
        5. **Reasoning**: NHLA had an ethical duty to prevent its loyalties to other clients from coloring its representation of the π’s in this action and from infringing upon the exercise of its professional judgment and responsibilities
           1. The combination of clients and circumstances placed NHLA in the position of being simultaneously obligation to represent vigorously the interests of two conflicting clients
     2. **Imputed Conflicts**: with some exceptions, (mainly for conflicts created by lawyers who join a firm from another firm or government office) the rules impute client conflicts among all affiliated lawyers
        1. Lawyers are affiliated for imputation purposes if they work in the same office
        2. **ABA Opinion 94-388**: two firms, although practicing under different names, may be deemed one firm for conflict purposes if they promote themselves as “affiliated” or “associated.”
           1. However, some courts have refused to impute conflicts within a public defender’s office on the assumption that the relationship of public defenders to their office is not the same as the relationship between a private lawyer and her firm
           2. Wyoming presumes prejudice when criminal Δ’s are represented by lawyers from the same private firm, but not for public defenders

A public defender’s office will have no reason to favor one client over another; the lawyers themselves have no financial incentive to prefer one client over another; indigent clients are likely to get better counsel from the defender and from appointed counsel, and paying outside counsel would be very expensive for taxpayers

* + - 1. **Rule 1.10(a)**: imputes rules 1.7 and 1.9 conflicts firmwide, was amended in 2002 to exclude imputation when one lawyer’s conflict is based on her personal interest if, in addition, there is no significant risk that the representation will be materially limited (ex: if a lawyer is conscientiously opposed to representing abortion hospitals, other lawyers in firm can)
    1. **Standing to Object**
       1. *Fiandaca*: issue was raised by the Δ, not by either of NHLA’s clients
       2. Courts let the government raise the issue of criminal defense lawyer conflicts and will disqualify counsel even if Δ’s are prepared to consent
       3. Minority view – some courts recognize nonclient standing to raise an opposing lawyer’s conflict
       4. Some courts suggest that only a client or former client has standing to complain
       5. Some courts hold that a nonclient has standing only if he or she can demonstrate that the opposing counsel’s conflict somehow prejudiced his or her rights
    2. **May a Lawyer Act Adversely to a Client on an Unrelated Matter?**
       1. A firm may represent two clients on different matters without issue when they are adversaries in a third matter where the firm represents neither side
       2. *Cinema 5, Ltd.*: an order disqualifying the π’s lawyer was affirmed because his partner was representing the Δ in another unrelated litigation
          1. The ‘substantial relationship’ test may properly be applied only where the representation of a former client has been terminated and the parameters of such relationship have been fixed
          2. Where the relationship is a continuing one, adverse representation is prima facie improper, and the attorney must be prepared to show, at the very least, that there will be no actual or apparent conflict in loyalties or diminution in the vigor of his representation
       3. The usual remedy when a lawyer acts adversely to a current client in litigation, even on an unrelated matter, is disqualification, although discipline and civil liability are also possible
       4. *Research Corporation Technologies, Inc. v. James*: firm was giving HP tax advice, firm was also going through merger with another firm, who was representing π’s in a suit against HP. For a few days, HP was getting tax advice and being sued by the same firm. Court didn’t disqualify firm from suits because there wasn’t a threat to client confidences and only a minor breach of the client’s expectation of loyalty
    3. **Confidentiality and Privilege in Multiple Client Representations**
       1. **Joint Representations**: the general rule is that communications between one common lawyer and the two clients (in situations where there are group discussions between clients A and B and the lawyer) retain their privileged status so long as the communications would have been privileged in the first place. However, in the event of a dispute between the two clients, neither client will be able to assert privilege for communications with the common lawyer
       2. **The Eureka Exception**: *Eureka* carved out an exception to the principle that joint clients cannot assert privilege in a later dispute between them. This exception applies when the common lawyer should not have accepted or continued the joint representation in the first place because of a conflict between the joint clients
          1. **Rule**: when an attorney improperly represents two clients who interest are adverse, the communications are privileged against each other notwithstanding the lawyer’s misconduct

Counsel failure to avoid a conflict of interest should not deprive the client of the privilege. The privilege, being the client’s, should not be defeated solely because the attorney’s conduct was ethically questionable

* + - 1. **The Common Interest Rule**: if someone hires a lawyer to represent her in a suit, privileged information the lawyer reveals to the other party in order to move the case forward doesn’t lose its privileged status
         1. The Common Interest Rule applies in pending or impending litigation
         2. However, same communication between clients without lawyer present is not privileged
         3. *In Re Regents of the University of California*: recognized that the legal interest between the owner of a patent and a prospective exclusive licensee was sufficient to privilege the communications between the owner and the licensee’s counsel
      2. **Some Other Issues**
         1. If a lawyer has one of two joint clients tell her information about the joint matter but gives her instructions to not tell the other client, restatement position is that clients should expect that the lawyer may share all information relevant to the lawyer's work with each of them. Lawyer should avoid issue by making it clear in retainer agreement that information from either client may be shared with the other client
         2. Joint privilege: when two or more persons are joint holders of a privilege, a waiver of the right of a particular joint holder of the privilege to claim the privilege does not affect the right of another joint holder to claim the privilege

Criminal case: *Henke* - 9th circuit held that a joint defense agreement establishes an implied attorney-client relationship between a lawyer for one Δ and the co-Δ.

*Almeida* - reached result contrary to *Henke*. When one party to a common interest arrangement decides to cooperate and testifies against the others, he waives protection of the privilege for his communications with lawyers for the other parties

*In Re Gabapentin Patent Litig.* - held that a joint defense agreement created fiduciary and attorney-client relationships between each lawyer and each client

* + - * 1. **Recommended Action**: lawyers should have a written agreement that explicitly negates an attorney-client relationship with and a fiduciary duty to the clients of the other lawyers if that is what they intend.

The agreement should also include a provision prohibiting each client from using it to disqualify another client's lawyer

* + - 1. **Class Conflicts**
         1. Before certifying a class, a court must find that the named class members will fairly and adequately protect the interests of the class
      2. **Appealability of Civil Disqualification Orders**
         1. An order granting or denying a motion to disqualify civil counsel is not subject to immediate appeal as of right in federal court
      3. **Malpractice Based on Conflicts**
         1. ***Simpson v. James*** [preface: client-client conflicts, malpractice based on conflicts]

**Facts**: π’s alleged negligence against partners of a law firm that represented both the buyers and sellers in a sale of corporate assets

Negligent in handling of the sale and subsequent restructuring of the buyers’ note in favor of the π’s

Simpson (π) operated a restaurant, which she desired to sell. She contacted James (Δ), an attorney who had previously represented her, concerning a sale. Oliver (Δ), James’ (Δ) partner, facilitated a transaction between Simpson (π) and a 3rd party. 3rd party paid in some cash and the rest of its own stock, but went bankruptcy shortly thereafter.

**Issue**: was there a conflict of interest between lawyers due to their firm’s representation of both sides of the transaction

**Holding**: affirmed judgment for π’s, π’s proved damages caused by lawyers

**Law**: an attorney may commit malpractice by representing both sides in a transaction

**Reasoning**: evidence was sufficient for a reasonable jury to conclude that an attorney-client relationship existed, as manifested through the parties’ conduct. Lawyer could have seized the insurance proceeds to satisfy the delinquent note, perhaps because of a conflict of interest, didn't mention this possibility to π

**Analysis**: the conflict allowed π to argue that divided loyalties prevented her lawyers from getting her a better deal. The more they got for her, the worse it would have been for the buyers

**Note**: Δ asserted a “**scribe defense**” 🡪 merely reduced agreement to writing. Didn’t work in this case, but can work in cases where client is sophisticated

1. **Consent and Waiver** 
   1. **Rule 1.7**: lets clients consent to work that would otherwise be forbidden
      1. Courts and the rules require lawyers to explain the conflict to a client before accepting consent. Requires informed consent in writing
         1. A client’s sophistication is a significant consideration in determining whether its consent to a conflict is informed
   2. ***CenTra Inc. v. Estrin***: a client’s knowledge that his law firm has, on previous occasions, represented parties that opposed the client in different matters does not provide an adequate foundation for informed consent with respect to a current simultaneous representation of two adverse clients with opposing interests in a specific dispute. No implied consent, the affirmative duty lies with the law firm and its attorneys
   3. Clients may consent to conflicts before they arise. Firms may ask a client to agree that the firm can be adverse to the client on unrelated litigation even while it is representing the client
   4. **Rule 1.7** recognizes that a blanket advance consent (little or no detail) can stand if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, particularly if the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation.
      1. The specificity required is tied to the sophistication level of the client
   5. Consent contemplates the client’s conscious, informed agreement. A client who has not consented may nevertheless waive a conflict depending on such factors as:
      1. The length of the delay in bringing the motion to disqualify
      2. When the movant learned of the conflict
      3. Whether the movant was represented by counsel during the delay
      4. Why the delay occurred
      5. Whether disqualification would result in prejudice to the non-moving party
      6. The court will also investigate whether the motion was delayed for tactical reasons
   6. ***Glueck***: π’s firm representing him in trial also conducted collective bargaining for a trade association of which the Δ was a member. Court characterized case as one in which an adverse party is only a vicarious client. Held that disqualification would only be ordered if the subject matter of the suit is sufficiently related to the scope of the matters on which the firm represents the association as to create a realistic risk either that the π will not be represented with vigor or that unfair advantage will be taken of the Δ
   7. ***Fund of Funds, Ltd. v. Arthur Andersen***: Δ was a client of Morgan Lewis (ML). ML was retained by π to represent it in possible securities actions against various entities. ML used another firm as its co-counsel on the cases. ML eventually uncovered information that showed that it could bring a case against Δ, and instead had the co-counsel firm bring the case. Courts held that this was not allowed, was like ML suing itself, since it had inside information that the co-counsel would use in trial. Because ML could not be directly adverse to its client Δ, neither could it be adverse indirectly through co-counsel firm

**VI. Successive Conflicts of Interest**

1. **Private Practice**
   1. ***Analytica, Inc. v. NPD Research, Inc.***
      1. **Facts**: Malec was an employee of NPD (Δ), who was given an equity interest as compensation for certain services. The law firm S&F handled the transaction. Malec then left NPD (Δ), forming Analytica (π), which established itself as a competitor of NPD. Analytica (π) subsequently filed an antitrust action against NPD (Δ). Analytica (π) was represented by S&F. NPD (Δ) moved to disqualify S&F.
      2. **Holding**: a lawyer may not represent an adversary of his former client if the subject matter of the two representations is substantially related
      3. **Law**: a law firm may not represent a principal of a former client in a lawsuit against the former client
      4. **Reasoning**: Δ gave the law firm confidential information to enable the firm to perform a legal service from which Δ would directly benefit
         1. If the lawyer could have obtained confidential information in the first representation that would have been relevant in the second, this rule applies. It is irrelevant whether he actually obtained such information and used it against his former client, or whether – if the lawyer is a firm rather than an individual practitioner – different people in the firm handled the two matters and scrupulously avoided discussing them. A per se rule of disqualification is preferable, as determination of the facts underlying a motion to disqualify would be difficult and time consuming if a case-by-case analysis were employed.
      5. **Analysis**: the focus is on what could have been obtained, because actual inspection makes no sense, so there must be a proxy due to there being no other way to do it. The rule stated here is universal. In the current age of megafirms, it sometimes presents a problem in that disqualification of one member of a firm usually disqualifies the entire firm. A large firm might have many clients and the possibilities of inadvertent conflicts are ever present
   2. **The “Substantial Relationship” Test**
      1. The modern articulation of the substantial relationship test is **Rule 1.9(a)**
      2. Key inquiry: defining scope of “substantially related” in the proxy asking if the first and second matters are the “same or substantially the same”
   3. **Can “Playbook” Create a Substantial Relationship**
      1. “Playbook Knowledge”: Working for a firm and working in certain areas allows a lawyer to learn how the firm approaches issues and conduct business. Some cases have ruled that it can be enough to create a substantial relationship, depending on its scope
   4. **The Loyalty Duty to Former Clients**
      1. Another value the substantial relationship protects is loyalty to a former client as a way to encourage clients to repose trust in their lawyers during the professional relationship
         1. Loyalty to a former client survives the termination of the relationship
         2. Courts have held that the duty of loyalty is sufficient all by itself to prohibit adverse representation, even with no confidential information at risk
         3. **Note**: can’t make conflicts laws too broad, otherwise discourages specialization
   5. **Malpractice Based on Successive Conflicts**
      1. A law firm that acts adversely to a former client in violation of the substantial relationship test will subject itself to liability for breach of fiduciary duty
   6. **Who is a Former Client?**
      1. In the area of successive conflicts, must ask not only whether a person or entity was a client for conflict purposes, but if so, whether the client is a former or still current client
         1. *Analytica*: company that provided the information was either the client of the firm or treated as a client because it had provided just the kind of confidential data that it would have furnished a lawyer that it had retained
      2. **Rule 1.18**: allows a firm to avoid imputation arising from a preliminary interview that does not lead to retention by screening the firm lawyer who conducted the interview
   7. **Like a hot Potato**
      1. *Unified Sewage Agency of Wash. v. Jelco*: law firms cannot escape the stricter current-client conflict rules by simply withdrawing from representation and converting a current client into a former one
      2. *Picker*: Jones Day sought to merge with other firm, however that would cause conflict because JD represented π in litigation and other firm represented Δ in another unrelated litigation. JD sought π’s informed consent in writing, and said they would screen attorneys, however π refused. JD dropped π as client. Court held that a firm may not drop a client like a hot potato, especially if it is in order to keep happy a far more lucrative client. Effort to fire π was rejected, π was deemed current client of JD, rule prohibiting suits against current clients applied
   8. **Thrust Upon Conflicts (Exception to the Hot Potato rule)**
      1. Conflicts arising out of a client’s acquisition. Whether or not lawyer can withdraw is evaluated on a case-by-case, fact intensive basis
   9. **Standing and Waiver**
      1. Concurrent conflicts may usually be waived
      2. **Rule 1.9(a)**: successive conflicts may always be waived. Courts have gone both ways in determining whether a nonclient can seek disqualification in successive conflict cases
   10. **The Appearance of Impropriety Test**: this test is no longer used except by a very few courts, due to being unpredictable and vague
   11. **Conflicts in Class Actions**
       1. *Agent Orange*: when an action has continued over the course of many years, the prospect of having those most familiar with its course and status be automatically disqualified whenever class members have conflicting interests would substantially diminish the efficacy of class actions as a method of dispute resolution. The traditional rules that have been developed in the course of attorneys’ representation of the interests of clients outside of the class action context should not be mechanically applied to the problems that arise in the settlement of class action litigation
2. **Imputed Disqualification and Migratory Lawyers**
   1. When a lawyer changes firms, need to ask:
      1. Why was the lateral lawyer conflicted in the first place?
         1. If it was imputed on her because of the work of a colleague at the firm, the conflict evaporates upon her departure
         2. Even if the conflict is personal (not imputed 🡪 stays with her), should we allow screening at the new firm to facilitate career mobility?
            1. According to ***Cromley*** 🡪 **yes**
   2. ***Cromley v. Board of Education*** [preface: successive conflicts of interest – imputed disqualification and migratory lawyers] **7th Circuit Case**
      1. **Facts**: Cromley (π), a high school teacher, brought an action against the Board of Education. During pretrial litigation, Cromley’s (π) attorney, Weiner, accepted a partnership in the law firm representing the Board (Δ). Weiner then withdrew as Cromley’s (π) attorney.
      2. **Law**: when a lawyer in a case moves to the other party’s law firm, the attorneys for the other party must be disqualified where the representations are substantially related, unless the presumption of shared confidences can be rebutted by the establishment of a screening process
      3. **Reasoning**: the subject matter both before and after π’s lawyer changed firms was π’s lawsuit against Δ. However, in this case, the presumption of shared confidences has been successfully rebutted by the timely establishment of a screening process. After the lawyer joined the Δ’s law firm, lawyer was denied access to the relevant files. Under threat of discipline, lawyer and all employees of the firm were admonished not to discuss the case. In addition, lawyer was not allowed to share in the fees derived from the case. The partner handling the case for the Δ affirmed under oath that all of the admonitions have been adhered to.
         1. **3-Step Test for determining whether an attorney should be disqualified:**
            1. Determine whether a substantial relationship exists between the subject matter of the prior and present representations
            2. If substantial relationship exists 🡪 rebuttable presumption of shared confidences arises: must ascertain whether the presumption of shared confidences with respect to the prior representation has been rebutted. If not rebutted, we must determine whether the presumption of shared confidences has been rebutted to the present representation. Failure to rebut this presumption would also make the disqualification proper
            3. Determining whether presumption has been rebutted: must determine whether the attorney whose change of employment created the disqualification issue was actually privy to any confidential information his prior law firm received from party now seeking disqualification of his present firm. Uncontroverted affidavits are sufficient rebuttal evidence

The rebuttal can be established either by proof that:

the attorney in question had no knowledge of the information, confidences and/or secrets related by the client in the prior representation; or

screening procedures were timely employed in the new law firm to prevent the disclosure of information and secrets

Examples of adequate screens (must be employed as soon as the disqualifying event occurred):

Instructions, given to all members of the new firm, of the attorney’s refusal and of the ban on exchange of information

Prohibited access to the files and other information on the case

Locked case files with keys distributed to few

Secret codes necessary to access pertinent information online; and

Prohibited sharing in fees derived from such litigation

* + 1. **Note**: **Screening is only for lateral lawyers, can’t screen intra-firm**
    2. **Analysis**: other factors help to determine whether adequate protection of the former client’s confidences has been achieved. Those factors include the size of the law firm, its structural divisions, the screened attorney’s position in the firm, the likelihood of contact between the screened attorney and one representing another party, and the fact that a law firm’s and lawyer’s most valuable asset are their reputations for honesty, integrity, and competence. The presumption of shared confidences has been found to be irrebuttable only when an entire law firm changes sides
    3. **Lawyer Disclosure of Employment Discussion with Adverse Firm**: **ABA Opinion 96-400** concludes that once a lawyer’s negotiations with an opposing law firm reach a critical stage (can happen in single conversation), lawyer must obtain client consent. The opposing firm may need consent of its clients as well. Must maintain trust/confidence
    4. **Swiss Verein**: avoid liability between countries 🡪 moving to biglaw (started in Big4)
  1. **Removing Conflicts from a Former Firm**
     1. **Rule 1.10(b)**: where a lawyer terminates an association with a firm and the firm then wishes to represent a new client whose interests are materially adverse to those of a former client represented by the former associate lawyer while at the firm, rule permits the firm to represent the new client, even if the matter is the same or substantially related to the one in which the formerly associated lawyer represented the former client, so long as the firm can show that no lawyer remaining in the firm has protected information that could be used to the disadvantage of the former client
  2. **Rebutting the Second Presumption**
     1. The presumption of shared confidences is taken very seriously. A biglaw firm was disqualified from a job that they had spent a lot of time on for hiring an attorney who had spent a small amount of time working for the other side

1. **Government Service**
   1. The problem of identifying the client is especially difficult for government lawyers
      1. **Rule 1.11** focuses on conflicts and screening when the lawyer’s former employer was a government entity
      2. **Rule 1.12** focuses on conduct of former judges and law clerks
         1. *Monument Builders of PA*: held that a former law clerk to a federal judge could not represent a private client in a matter on which she worked as a law clerk
   2. ***Armstrong v. McAlpin*** [preface: successive conflicts of interest – government service, reach of **Rule 1.11**]
      1. **Facts**: SEC commenced investigation of Δ and others, believing them to have looted the company they controlled. A receiver was eventually appointed to attempt to recover the company’s funds. The firm representing π hired an attorney that had been involved with the investigation at the SEC. Δ moved to disqualify attorney, claiming conflict (confidential government information)
      2. **Law**: It is not a per se ground for disqualification when an attorney involved in a government investigation joins a private firm involved in litigation concerning the same matter
      3. **Reasoning**: Under DR 5-105(D) of the ABA Code of Professional Responsibility, the disqualification of one firm member disqualifies the entire firm. However, policy reasons exist for not applying this rule when the cause of the conflict is prior government service. If it were applied, it would be extremely difficult for the government to obtain qualified lawyers to work for it, as they would face the prospect of being unable to obtain private employment ever again. The better review is to consider disqualification on a case-by-case basis. If a court finds the prior government attorney to be effectively screened, disqualification is not necessary.
      4. **Analysis**: due to the proliferation of both government and large, multi-state law firms, the problem addressed here has become more common in recent years. The solution reached by the district court, accepting a screening of the disqualified attorney from the litigation in question, has been the most common response. While technically a violation of DR 5-105(d), this “Chinese Wall” approach has been accepted in many jurisdictions
   3. **The Revolving Door in Model Rules**
      1. **Rule 1.11(a)**: would allow a lawyer to represent a private client in connection with a matter in which the lawyer participating personally and substantially as a public officer or employee, so long as the appropriate government agency gives its informed consent
         1. The rule would also allow the lawyer to represent the other side on the same matter which he had worked on in public office, however some courts would not allow this to occur
         2. If the former lawyer cannot get the consent contemplated by the rule, or is disqualified because she possesses confidential government information, her firm can accept the representation so long as the lawyer is screened and receives no portion of the fee
         3. **Exception**: the model rules would not allow the government to consent to private representation after leaving government where the lawyer has confidential government information about a person that could be used in the representation of a private client whose interests are adverse to that person

**Part Three: Special Lawyer Roles**

**VII. Ethics in Advocacy**

* ***Client Perjury and Related Dilemmas***
* ***Legitimate Advocacy That Frustrates Truth***
* ***Hardball, Incivility, Biased Conduct***

An advocate’s sees their job as to win, not to be right or wrong, because the loser is wrong by definition. Defending a guilty person is a non-issue because guilt is a legal conclusion.

Theories are not self-executing

1. **Four Views of Adversary Justice**
   1. **Anthony Trollope – Orley Farm**
      1. Lawyer’s duty is to get a positive verdict, regardless

***Simon Rifkind and Marvin Frankel: Two Views on Truth in the Adversary System***

* 1. **Simon Rifkind – The Lawyer’s Role and Responsibility in Modern Society**
     1. The lawyer’s role and responsibility as attorney comes into being only when he is a member of a client-attorney, symbiotic team
     2. The advocacy process is a form of organized and institutionalized confrontation
     3. Watergate caused an unflattering light to shine upon quite a number of lawyers
  2. **Marvin Frankel – Partisan Justice**
  3. **The Advocate as Performance Artist – Robert Post – on the Popular Image of the Lawyer: Reflections in a Dark Glass**

1. **Are Lawyers ever Morally Accountable for their Clients**
   1. **Ronald Goldfarb – Lawyers Should be Judged by the Clients they keep**
      1. Clients taking “bad” clients should be judged for this
2. **Truth and Confidences**
   1. ***Nix v. Whiteside*** (1986)
      1. **Facts**: an altercation involving Whiteside (Δ) resulted in the stabbing death of another. Prior to testifying, Δ told his attorney that he intended to state that he had seen a gun in the decedent’s hand, even though he had previously stated to the contrary. The attorney informed him that to do so would constitute perjury, which he couldn’t allow. The attorney informed Δ that if he did so testify, he would inform the court of Δ’s perjury. Δ didn’t so testify, was convicted of murder. He appealed, contending that counsel’s threats to expose his perjury constituted a denial of counsel under the Sixth Amendment
      2. **Law**: a criminal Δ is not denied his right to counsel if his counsel refuses to allow him to commit perjury (evaluated under *Stickland* test)
      3. **Reasoning**: the Sixth Amendment’s right to counsel clause is not abridged unless counsel is so ineffective as to not have been functioning as counsel. It is the duty of the counsel to take all lawful measures to exonerate his client. However, counsel has no right to violate the law, or to assist others in doing so. Further, an attorney is barred from knowingly using perjured testimony or false evidence. Since counsel is not permitted to assist in perjury, it can hardly be considered ineffectiveness when he refuses to do so
      4. **Analysis**: It has never been affirmatively held that an accused has an absolute right to testify on his own behalf. In fact, at one time an accused was categorically prohibited from such testimony. While not expressly approving such a right, the Court here simply noted in passing that such a right is universally recognized
   2. **After *Nix*, What?**
      1. **The Best Ethical Solution**: many courts allow the narrative approach when a lawyer thinks that his client is going to lie, wherein clients tells his story without the lawyer endorsing it or bringing it up again in closing
      2. **Movie Clip: Anatomy of a Murder**: lawyer wanted Δ to come up with insanity on his own
3. **Fostering Falsity or Advancing Truth?**
   1. **Law of Perjury**: perjury = willfully false statement, under oath, regarding facts material to the hearing
      1. ***Bronston***: SCOTUS reversed a perjury conviction for a Δ who answered a question truthfully on its face (but which was an evasive answer, and questioner didn’t realize that Δ hadn’t really answered question)
      2. ***DeZarn***: Δ convicted of perjury for giving categorical answers to questions in order to mislead (questioner asked about 1991 when he meant 1990, Δ answered regarding 1991 truthfully, even though Δ knew that questioner meant 1990 and the answer was different in that case)
   2. ***“Playing Games with the jury?”*** – defense attorney used lack of tracing report for gun in his closing argument, jury asked why there was no tracing report done, prosecutor’s introduced tracing report, showing that it had been done, and copy had been given to defense. Client was convicted.
   3. **Encouraging false inferences**: a lawyer may encourage false inferences in two ways:
      1. Lawyer asking jury to draw inference from evidence when evidence doesn’t support that inference 🡪 may violate **Rule 3.4(e)** (might deny Δ right to fair trial)
      2. Lawyer faced with harmful evidence 🡪 may try to discredit evidence through impeachment devices (calculated to encourage jury to believe that a witness is mistaken/lying or document is false), or if evidence is ambiguous may try to ask jury to draw the inference most favorable to his client (strategies can be used concurrently)
   4. **The Subin-Mitchell Debate** (not law just a debate)
      1. **Subin**: argues that lawyers should be prohibited from presenting false case. The right to present a defense is not absolute
      2. **Mitchell**: it’s ok to use actual evidence to ask jury to draw inferences, even if they are untrue (trying to raise doubt by asking jury to appreciate possibilities other than client’s guilt).
4. **Misstating Facts, Precedent, or the Record**
   1. *Walser* – attorney edited citation to support her assertion that she should have been given more time to respond, however the parts she edited out were harmful to her position, and she did it in order to deceive court. Reprimanded.
   2. *Fletcher* – selectively quoted deposition testimony in order to make it seriously misleading. Suspended for 3 years
   3. **Note**: prosecutors don’t have the same rights as defense lawyers (they’re on different playing fields)
      1. “I submit to you that” 🡪 not giving any statement that it is true, just for jury’s consideration

**VIII Special Issues in Criminal Prosecutions**

1. **Real Evidence**
   1. ***In re Ryder* (1967)** [preface: special issues in criminal prosecutions: real evidence and legal ethics]
      1. **Facts**: Ryder, an attorney, hid stolen money and a sawed-off shotgun belonging to his client in a safe-deposit box at this bank, intending to keep it there until after his client’s trial for armed robbery
      2. **Law**: a defense attorney’s withholding of incriminating evidence during a criminal proceeding for the purpose of hindering the preparation of the prosecution’s case constitutes unethical deception and misconduct
      3. **Reasoning**: Ryder took possession of the stolen money and sawed-off shotgun specifically to destroy the chain of evidence linking his client to the robbery. He intended to retain the evidence until at least after Cook’s trial, unless the government first discovered it and compelled its production. Ryder knew that the money was stolen, and knew of all the other illegal activities that occurred.
   2. **Real Evidence and Criminal Law**: may a lawyer advise a client to lie to the public if the lie to the public isn’t a crime or fraud? It seems so, if the lie is not criminal or fraudulent, and if the advice doesn’t aid a crime or fraud, and is not under oath, then the advice is allowed
      1. ***US v. Philip Russell***: attorney destroyed hard drive with child porn on it because his client, a church, didn’t want to turn in the priest, just fire him. FBI was already investigating incident and asked for laptop, but attorney had already destroyed it 🡪 attorney charged with obstruction of justice, plead guilty
      2. ***People v. Meredith* (1981)** [preface: real evidence and the attorney-client privilege]
         1. **Facts**: Meredith (Δ) was charged with robbery and murder. Also charged was Scott (Δ). Scott told his counsel that after Meredith had killed person, Scott took victim’s wallet and disposed of it in a trash container near Scott’s home. Counsel (Schenk) had investigator (Frick) go retrieve the wallet and bring it back to counsel, who eventually turned it over to the prosecution. At trial, investigator was subpoenaed to testify about where he had found the wallet. The testimony was admitted over Scott’s (Δ) attorney-client privilege objection. Scott (Δ) was convicted, and the state court of appeals affirmed
         2. **Law**: the attorney-client privilege doesn’t protect from disclosure testimony regarding observations made by counsel or his agent concerning evidence which has been removed by counsel or the agent
         3. **Reasoning**: deciding this issue requires the balancing of competing considerations. On the one hand, to deny protection to observations arising from confidential communications could chill protected attorney-client communication. On the other hand, the privilege cannot be extended so far as to render immune from discovery evidence first obtained by the defense. It cannot be doubted that communications between counsel and his investigator are protected by the privilege. From this it is not a large step to conclude that information acquired solely as a result of such communications are also protected. Here, Frick’s knowledge of the location of the wallet was a result of information obtained from Schenk, so without more, introduction of testimony regarding his observations would be protected. However, when counsel or his agent takes the extra step of moving or altering the evidence, the opportunity of the prosecution to observe it is forever lost. To hold that testimony regarding the original state of the evidence cannot be compelled under these circumstances would effectively permit the defense to destroy critical evidence, a result not contemplated by the attorney-client privilege. Here, Frick did in fact remove the wallet, so the prosecution was properly permitted to question him concerning it
      3. ***Olwell*** [preface: note case] Attorney’s client gave him knife that client had used in crime. Attorney withheld and was tried for contempt. Court held that attorney should give the knife to the defense counsel, but not reveal the source (his client). **Things aren’t privileged, only communications**
   3. **The Turnover Duty (But How Broad?)**
      1. If evidence is a fruit or instrumentality of a crime, lawyer can't keep it
      2. Lawyer can escape turnover obligation by simply not taking possession of the item
   4. **Does the Source Matter?**
2. **Some Issues Concerning Prosecutors**
   1. **Constitutional and Ethical Disclosure Obligations**
   2. **Ethical Issues in Making the Charging Decision**

**IX Negotiation and Transactional Matters**

1. **Lawyers as Negotiators: an Introduction**
2. **Negotiation: the Risks to Lawyers**: except for settlement negotiations and plea bargains, negotiations don’t involve a tribunal. Therefore, lawyer’s ethical responsibilities are governed by **Rules 1.2**, **1.6**, and **4.1**. Most negotiation issues arise in one of three ways: **1) the “bad client” problem** (you realize client is fraudster and you’ve been helping him) **2) risk of liability for the lawyer’s own statements to the opposing lawyer where the client has done no wrong**. **3) an opponent may be laboring under a false assumption that you did nothing to create and which influences his negotiating position**
   1. **The “Bad Client’” Problem**: a lawyer may have to correct fraud or a false statement in a matter before a tribunal, even if that means revealing confidences protected by **Rule 1.6**
      1. **However**, a lawyer’s mandated duty under **Rule 4.1(b)** to speak up if “necessary” to avoid assisting a client’s crime or fraud disappears when “disclosure is prohibited by **Rule 1.6**.”
         1. This is true even though the client’s crime or fraud will be financially devastating to third parties, even if revelation can stop the crime or fraud before it is concluded, and even though the lawyer may have been the unwitting conduit of false information
            1. Lawyer can’t assist the client, will likely have to withdraw
            2. If an exception to **Rule 1.6** applies (**Rule 1.6(b)**), the prohibition on disclosure lifts, and the **Rule 4.1** obligation to disclose to avoid assisting the crime or fraud is left standing
      2. **The Noisy Withdrawal** (less prominent now that there are exceptions to confidentiality)
         1. Lawyer withdraws and disaffirms its previous opinion or assertions
   2. **The Lawyer’s Own Statements**
      1. ***Fire Insurance Exchange v. Bell*** (1994) [preface: when lawyers do make false statements in negotiation and are later challenged, they often argue that the opposing lawyers had no right to rely on what they said, that the adversary system entitled them to lie or in any event it did not entitle the opposing lawyers to believe them, and that the solution is for opponents to do their own investigations. This is a kind of “all’s fair in love and law” argument, this opinion responds to this issue]
         1. **Facts**: π (an infant) was severely burned by leaking gasoline. His guardian sued the insurer of the apartment. Lawyer retained to represent π negotiated with counsel for insurance company. During the negotiations counsel for insurance company intentionally made misrepresentations to π’s lawyer as to the limits of insurance coverage (said they were $100K when they were really $300K). π’s lawyer informed guardian that he had been intentionally deceived by opposing counsel, π sued Δ for its attorney’s fraudulent misrepresentation of the policy limit.
         2. **Law**: an attorney has the right to rely upon representations made by opposing counsel
         3. **Reasoning**: courts have a particular constitutional responsibility with respect to the supervision of the practice of law. The reliability and trustworthiness of attorney representations constitute an important component of the efficient administration of justice. A lawyer’s representations have long been accorded a particular expectation of honesty and trustworthiness. The law should promote lawyers’ care in making statements that are accurate and trustworthy and should foster the reliance upon such statements by others
         4. **Analysis**: In fulfilling the duty to represent a client vigorously, lawyers need to be mindful of their obligation to the administration of justice, which is a truth-seeking process designed to resolve human and societal problems in a rational, peaceful, and efficient manner
   3. **Is There a Right to Rely on an Opposing Lawyer’s Legal Opinions?**
      1. Differentiation between fact and legal opinion
      2. ***Hoyt Properties, Inc. v. Production Resource Group, LLC*** (2007) [preface: a legal opinion may create liability because of facts that the opinion implies are true]
         1. **Facts**: Hoyt (π) brought an eviction against Δ and its subsidiary. π settled with subsidiary and entered into release discussions with Δ, but before agreeing to release Δ from liability, π’s owner had a conversation with Δ’s attorney. π’s owner said, “I don’t know of any reason how we could pierce the corporate veil, do you?” π alleged that Δ’s attorney responded, “there isn't anything. Δ and subsidiary are totally separate.” π claimed that, relying on the statement made by Δ’s attorney, it agreed to release Δ. Subsequently, π learned that a complaint in another action alleged contradictory facts that would support piercing the corporate veil. π brought suit to rescind the release, claiming that Δ’s attorney’s response had been a fraudulent misrepresentation. To succeed, π would have to prove that the attorney’s statement had been knowingly false and that π had relied on it
         2. **Law**:
            1. A statement made by an attorney is actionable as a fraudulent misrepresentation where it is a statement implying the existence of facts that support a legal opinion
            2. A statement by an attorney is actionable as a fraudulent misrepresentation where it constitutes a direct factual assertion
            3. A genuine issue of material fact is created by an attorney’s statements that are actionable as fraudulent misrepresentations where there is a genuine issue of material fact as to whether the attorney either knew his statements were false when made or did not know whether they were true or false
         3. **Reasoning**:
            1. The attorney’s sentence was a representation that no facts existed that would support a piercing claim. Even if that sentence was a legal opinion, it nevertheless implied that the attorney was aware of no facts supporting such a claim. Since the statement was not an expression of pure legal opinion, but a statement implying the existence of facts supporting a legal opinion, the attorney's representation in the first sentence was actionable
            2. The representation made by the attorney’s second sentence, when viewed in the light most favorable to π under the summary judgment standard, is a direct factual assertion that relationship between Δ and subsidiary was such that there were no facts to support a piercing claim. This representation is actionable
            3. For the attorney’s statements to be fraudulent they must have been made with the attorney’s knowledge of their falsity when made or made without knowing whether they were true or false. Here, whether the attorney knew his representations were false when made requires an assessment of the parties’ credibility and weighing the evidence. These tasks cannot be done on summary judgment. absent evidence in the record establishing, as a matter of law, that the representations were not knowingly false when made, there is a genuine issue of material fact for tial on that issue. There is also a genuine issue of material fact as to whether the attorney made the representations without knowing whether they were true or false. He knew about the complaint brought in the separate, third party action, which alleged facts that would support a piercing claim. However, he had not formed an opinion, one way or the other, about those alleged facts. This could lead a trier of fact to conclude that when the attorney made the representations, he did not know whether they were true
         4. **Analysis**: Justice Anderson dissented, finding that because the first element of a claim for fraudulent misrepresentation is only met if the false factual representation by the party involves a “fact susceptible of knowledge,” Δ’s attorney’s representations could not be actionable. Justice Anderson reasoned that in order for the attorney to imply facts that “there isn’t anything” to a veil-piercing claim, the attorney would have to imply a factual assertion that the second prong of the piercing claim is met (that the claim is “necessary to avoid injustice or fundamental unfairness.”). Because this is a subjective inquiry made by a court, it is not a “fact susceptible of knowledge,” and even if it was, it would be unreasonable to conclude that the attorney falsely implied that a veil-piercing claim would not meet this prong. In other words, if Δ’s attorney was to evaluate the claim and decide that it was viable, the attorney would have to conclude that it would be unjust and fundamentally unfair to the attorney’s client to escape liability. Those are not the types of conclusions as attorney is expected to make, and they are generally not susceptible of the attorney’s knowledge. Similarly, because the two-prong test for piercing the corporate veil is a subjective test applied by the court, the attorney could not be in a position to know 1) what facts any particular court or factfinder might find significant, and 2) which factors under the first prong the court might apply, since the enumerated factors in case law are not exhaustive. Therefore, Justice Anderson found it difficult to see how the attorney could as a matter of law represent that “no facts” existed to support a piercing claim, given that a court could find a fact significant that no other court ever had in the past

**X Lawyer for Companies and Other Organizations**

* 1. **Introduction: Caught in the Internal (Eternal? Infernal?) Triangle, or “Who’s Your Client?”**
     1. **Rule 1.13(a)**: a lawyer, whether employed or retained, represents the organization acting through its duly authorized constituents
     2. When a lawyer is retained instead of employed by the company-client, she can be slightly more independent
        1. A company is not the only one at risk of indictment, officers/employees are too
  2. **Stanley Sporkin’s Famous Questions**
     1. “Keating testified that he was so bent on doing the ‘right thing’ that he surrounded himself with literally scores of accountants and lawyers to make sure all the transactions were legal. The questions that must be asked are:
        1. Where were these professionals, a number of whom are now asserting their rights under the Fifth Amendment, when these clearly improper transactions were being consummated?
        2. Why didn’t any of them speak up or disassociate themselves from the transactions?
        3. Where also were the outside accountants and attorneys when these transactions were effectuated?

What is difficult to understand is that with all the professional talent involved, why at least one professional would not have blown the whistle to stop this

* + 1. **SG: Lawyers are the canaries in the mine shaft of fraud and corruption**
    2. In a large company, it is nearly impossible to engage in a large transaction without using counsel 🡪 they are especially close to the action, therefore regulators see lawyers as an early warning system against corporate wrongdoing and expect them to protect their client (and uphold regulatory requirements) even at the expense of their bosses’ and perhaps even their own employment security
       1. Counterargument: deputizing lawyers to be the eyes and ears of government will lead to less compliance, because company officers may then exclude lawyers from learning about questionable behavior (but, in this highly regulated environment, could corporate leaders exclude lawyers from knowing about their plans, even if they wished to do so?)
    3. ***Matter of Word Health Alternatives, Inc.*** [preface: note case]. Trustee in bankruptcy sued various corporate officials, including General Counsel (who was also an officer). General Counsel moved to dismiss the malpractice claim against him, court refused
       1. **Rule**: employed lawyers rarely get sued for failing to protect the client from management’s transgressions, but when management changes, company goes bankrupt and trustee takes over, or if SHs bring a derivative claim, the situation could change

1. **Conflicts and Confidentiality in Entity Representation**
   1. **Change in Corporate Control**
   2. ***Tekni-Plex, Inc. v. Meyner & Landis*** (1996)
      1. **Facts**: Tang was president, CEO, sole SH of π. Δ represented Tang and π on various legal matters. Tang agreed to sell π corporation to a 3rd party, and shell company was formed. After merger, π would cease to exist, and acquisition corporation would change its name to π’s. Tang represented that π was fully compliant with environmental regulations, however after sale, π claimed that machines were emitting pollutants and were not allowed to operate, and sued Tang. Tang retained Δ as counsel, π sought to enjoin Δ
      2. **Law**: Counsel cannot represent a present client against a former client involving matters that are substantially related to the prior representation and where the interests of the present client are materially adverse to the interests of the former client
         1. **Test for Disqualification**: party seeking disqualification (new π in this case) has the burden of satisfying a 3-pronged test, by establishing that:
            1. It assumed the role of counsel’s “former client,”
            2. The matters involved in both representations are substantially related, and
            3. The interests of counsel’s present client (Tang in this case) are materially adverse to the interests of the former client
      3. **Reasoning**: New π had burden of satisfying the 3-pronged test. 1) New π is a former client of Δ since following the merger, the business of old π remained unchanged and consequently control of the attorney-client privilege passed to the hands of the new π management. 2) the court found that there was a substantial relationship between the current and former representations since the current dispute concerned the merger agreement on which the law firm had represented old π. 3) the court concluded that the interests of Δ’s present (Tang) client were materially adverse to the interests of its former client π, because the claim set the purchaser’s interest against Tang’s interest as the seller. Because of the inherent conflicts of interest, Δ was disqualified from representing Tang
      4. **Analysis**: Although the court found that new π is a former client of Δ since it is essentially the same as old π, they prohibited Δ from releasing certain communications to new π. These communications included Tang’s confidences to Δ during the merger negotiations. Giving new π this information would cause a chilling effect between attorneys and their clients since clients would worry that their privileged communications with counsel might later become available to others
   3. ***In re Grand Jury Subpoena*** (2005) [preface: addresses the attorney-client privilege and related matters in the corporate context. Court describes the dangers to corporate counsel and their client if warnings to corporate constituents are inadequate, as was nearly true here] 4th Cir.
      1. **Facts**: Former employees of AOL contended that grand jury subpoenas for documents related to an internal investigation conducted by AOL’s attorneys should be quashed because the requested documents were protected by the attorney-client privilege and the joint defense privilege
      2. **Law**:
         1. Conversations between a corporate employee and a corporation’s attorneys during an internal investigation are not protected by the attorney-client privilege where the employee cannot show that an attorney-client relationship was formed during the investigation
         2. Conversations between a corporate employee and a corporation’s attorneys during an internal investigation are not protected by the joint defense privilege where the employee has entered into a common interest agreement with the company following the investigation
      3. **Reasoning**:
         1. The essential elements for the formation of an attorney-client relationship between the investigating attorneys and the employees were missing at the time of the interviews. Despite employees’ subjective belief that the attorneys were representing them personally, there was no evidence of an objectively reasonable, mutual understanding that the employees were seeking legal advice from the attorneys or that the attorneys were rendering personal legal advice. This conclusion is supported by the attorney’s disclosure to the employees that they represented AOL, and that the privilege and the right to waive it were AOL’s alone. Moreover, the attorneys’ statement to the employees that they could represent them absent a conflict of interest was not a statement that they were representing them. The employees never asked the attorneys to represent them, nor did the attorneys offer to do so
         2. The joint defense privilege is an extension of the attorney-client privilege, and serves to protect communications between parties who share a common interest in litigation. The purpose of the privilege is to allow persons with a common interest to communicate with their respective attorneys and with each other to more effectively prosecute or defend their claims. For the privilege to apply, the proponent must establish that the parties had “some common interest about a legal matter.” An employee’s cooperation in an internal investigation alone is not sufficient to establish a common interest; rather “some form of joint strategy is necessary.”
      4. **Analysis**: if the investigating attorneys had in fact entered into an attorney-client relationship with the employees, they would not have been free to waive the emloyees’ privilege when a conflict arose, since ethically they couldn’t place one client’s interests above those of another. The attorneys would have had to withdraw from all representation and to maintain all confidences. As the court itself observes, investigating counsel would not have been able to robustly investigate and report to management or the BOD of a publicly-traded corporation with the necessary candor if it were constrained by ethical obligations to individual employees. It is exactly for this reason that courts are reluctant to find that investigating attorneys who interview corporate employees or other corporate constituents form an attorney-client relationship with those interviewed. If they did, the investigating attorney would be faced with multiple conflicts and would be immobilized from conducting an investigation into wrongdoing
   4. **Who’s Your Client? (Reprise)**
      1. *Matter of Bevill* [preface: note case]identified a 5-part burden for corporate officers who claim a personal privilege for communications with corporate counsel:
         1. Must show that they approached counsel for the purpose of seeking legal advice
         2. They must demonstrate that when they approached counsel they made it clear that they were seeking legal advice in their individual rather than representative capacities
         3. They must demonstrate that the counsel saw fit to communicate with them in their individual capacities, knowing that a possible conflict could arise
         4. They must prove that their conversations with counsel were confidential
         5. They must show that the substance of their conversations with counsel did not concern matters within the company or the general affairs of the company
   5. **Members of Corporate Families**
      1. **Corporate Family Conflicts**
         1. Representation of one company doesn’t by itself automatically translate into a professional relationship with all separately incorporated affiliates in the same corporate family
            1. **ABA Opinion 95-390**: adversity toward an affiliate of a client may be forbidden if the two companies operate as alter egos; if the two companies have integrated operations and management; if the same in-house legal staff handles legal matters for both the affiliate and the client; or if representation of the client has provided the law firm with confidential information about the affiliate that is relevant in any matter adverse to the affiliate
         2. When you represent one member of a corporate family, when if ever are other members of the family your clients, too? **Tests**:
            1. **Express agreement**
            2. **Implied agreement**
            3. **Possession of relevant information from Subsidiary gained in represented Parent**
            4. **Integrated management, systems, counsel**
            5. **Economic effect on Parent**
      2. **Privilege Issues in the Corporate Family**
         1. Joint clients cannot assert privilege in the event of later adversity between them
         2. *Teleglobe* [preface: note case, endorsed 4 principles]
            1. If indeed a parent’s counsel represented both the parent and the subsidiary, then the joint client exception to the privilege would apply and the subsidiary would be entitled to use the privileged information against the parent if the two became adverse
            2. Reminded all that a parent has a strong and legitimate interest in having its lawyers (especially inside lawyers) jointly represent its subsidiaries where their interests are aligned
            3. The fact that the work of the parent’s counsel concerns the subsidiary or requires dealing with or getting information from it doesn’t mean that the subsidiary is necessarily a client as well
            4. Invoked the “*Eureka*” principle to avoid loss of privilege based on allegation that the firm’s in-house counsel jointly represented both BCE and Teleglobe (the guiding principle of *Eureka* is that when an attorney errs by continuing to represent two clients despite their conflicts, the clients – who reasonably expect their communications to be secret – are not penalized by losing their privilege.)
      3. **Closely Held Entities**
         1. ***Murphy & Demory, Ltd., et al. v. Admiral Daniel J. Murphy, U.S.N. (Ret.), et al.*** (1994)
            1. **Facts**: Adm. Murphy (Δ) and Demory (π) co-owned Murphy & Demory, Ltd. The law firm Pillsbury (Δ) for π, through its attorneys Siemer (Δ) and Mendelson (Δ) assisted Murphy (Δ) in his efforts to take control of Murphy & Demory (π) or to form, before resigning from the company, a new corporation to compete with Murphy & Demory (π). Pillsbury (Δ) ignored its junior associates’ warnings that the dual representation was rife with conflicts of interest, with possible breaches of fiduciary duty, and use of corporate opportunities. Murphy & Demory (π) filed suit against Admiral Murphy (Δ) and against Pillsbury (Δ)
            2. **Law**: Where dual representation of both a corporation and its individual owners presents a conflict of interest, the attorneys must obtain the corporation’s consent for such representation after full disclosure of all material facts
            3. **Reasoning**: Pillsbury (Δ) failed to disclose the conflict, to obtain consent for the dual representation of both Murphy (Δ) and Murphy & Demory, Ltd. (π), or, failing that, to withdraw from the representation. In concluding that there was no conflict, Siemer (Δ) willfully ignored the Rule of Professional Conduct. As a direct and proximate result of Pillsbury’s (Δ) legal malpractice, Murphy & Demory, Ltd. (π) suffered compensatory damages of $500,000, judgment entered for that amount plus interest
            4. **Analysis**: The court was particularly disturbed by the fact that every inquiry by an associate into the propriety of the firm’s actions was referred to Siemer (Δ) for resolution. Siemer (Δ), the partner in charge of the client relationship affected by the issue, was the least likely to be objective, yet she was the ultimate arbiter of whether the firm had a conflict of interest. Mendelson (Δ) was held equally responsible for the legal malpractice since he was senior enough to have put a stop to the undisclosed dual representation
2. **Sarbanes-Oxley and the Rule 1.13 Amendments**
   1. Premise is that lawyers who work for companies are likely to know early on if something is amiss
   2. **Rule 1.13** acts to compel the lawyer to act to protect the client against the misconduct of its other agents
   3. lawyers who become aware of evidence of a material violation of securities law or fiduciary duty or similar law, whether federal or state, must report what they know to the company’s chief legal officer or its CEO

**Part Four: Avoiding and Redressing Professional Failure**

**XII Control of Quality: Reducing the Likelihood of Professional Failure**

1. **Admission to the Bar**
   1. ***In re Mustafa*** (1993)
      1. **Facts**: while in law school, Δ shared access to and control over the checking account for the law school’s moot court program. Δ wrote checks for his own use, was found out and Δ was turned in, while he confessed to the dean the same day. Committee found that Δ always intended to repay the sums taken from the fund and had made full restitution before there was any threatened action by the law school. Committee recommended he be admitted
      2. **Law**: in order to gain admission to the Bar, an applicant must demonstrate by clear and convincing evidence that he possesses good moral character and general fitness to practice law at the time of admission 🡪 Δ failed to establish that he had good moral character required for admission to the Bar, application denied
      3. **Analysis**: while criminal conduct has traditionally excluded Bar applicants, a felony conviction automatically disqualifies an applicant in only 8 jurisdictions. Jurisdictions consider things like nature of crime, how long ago it was, conduct of applicant since then
2. **Transient Lawyers and Multijurisdictional Firms: Local Interests Confront a National Bar**
   1. ***Leis v. Flynt*** [preface: admissions pro hac vice]
      1. **Facts**: out-of-state counsel for π contended that a state court’s summary denial of their request to appear pro hac vice was unconstitutional
      2. **Law**: absent a governing rule or statute, a summary denial of a request to appear pro hac vice is not unconstitutional
      3. **Reasoning**: the Constitution doesn’t create property interests; rather, it guarantees due process protection to rights created elsewhere. In the context of this case, the right to practice pro hac vice cannot be created by the Constitution, such right must arise elsewhere. In Ohio, there is no law or rule governing pro hac vice admissions. Consequently, there is no source of a substantive right to practice that the Constitution must protect.
   2. **Services Other Than Litigation**
      1. ***Birbrower, Montalbano, Condon & Frank v. Superior Court*** (1998) [preface: common law, not model rules case]
         1. **Facts**: Δ, NY law firm unlicensed to practice in CA, performed legal services for π. π refused to pay, alleging malpractice and claiming that the firm could not collect its fee because of its unauthorized practice of law
         2. **Law**: advising a client and negotiating a settlement agreement in CA without a license constitutes the unauthorized practice of law and no fee may be collected to the extent that the fee was for those services

**XIII Control of Quality: Remedies for Professional Failure**

1. **Malpractice and Breach of Fiduciary Duty**
   * 1. **Is Greater Liability Exposure the Result of a Decrease in the Sanctity of Professions Generally?**
        1. Increasing trend in malpractice actions against doctors. Made it socially acceptable to sue professionals and to seek large recoveries of settlements
        2. Increase in liability of accountants to persons who are not in privity 🡪 created theories that could easily be used against lawyers, they perform similar services
   1. **Liability to Clients**
      1. ***Togstad v. Vesely, Otto, Miller & Keefe* (1980)** [preface: liability to clients]
         1. **Facts**: Togstad (π) was rendered paralyzed after a medical procedure. Months later, π consulted with Miller (Δ) of Δ law firm regarding a possible malpractice action. After an initial consultation, Miller (Δ) informed π that he didn’t think she had a case, but that he would talk to his partners. Miller (Δ) never called back. After Minnesota’s two-year statute of limitations on medical malpractice had expired, π brought a legal malpractice actions against Miller (Δ) for giving them erroneous advice and not advising them of the two-year statute. Jury found Miller (Δ) to have committed malpractice and awarded $600K in damages, Δ appealed
         2. **Law**: A retainer is not required for an attorney-client relationship that may give rise to a malpractice claim to exist
         3. **Reasoning**: The first element of in a malpractice claim is the existence of an attorney-client relationship. The crux of this relationship is the provision of advice by the attorney that he either knows or should know will be followed by the person to whom he provides the advice. This does not require actual retention. Here, π sought and obtained legal advice from Miller (Δ). It was entirely reasonable for Δ to have expected π to have followed this advice, which is what π did. As a result, for purposes of a malpractice action, an attorney-client relationship between π and Δ existed
         4. **Analysis**: It is unclear whether the attorney-client relationship is defined by contract or tort theory. The court here recognized a diversity of opinion but didn’t indicate its preference for one vs. the other. The court believed the contract and tort analyses for this case to be so similar that they didn’t need to be distinguished
   2. **What is the Required Standard of Care?**
      1. A mere error of judgment doesn’t constitute malpractice
      2. *Larkin, Hoffman, Daly & Lindgren*: held that lawyer who failed to do necessary research cannot claim an exercise of reasonable judgment as a defense to a malpractice claim
      3. If a lawyer has persuaded a client to use her services by proclaiming some expertise in a particular field, the client will expect her to know more about the field than a lawyer who makes no such claims, and lawyer will be judged by the standard of the specialty
   3. **Settlement Duties**
      1. The duty of care a lawyer owes a client includes a duty to attempt to effectuate a reasonable settlement where standards of professional care in the jurisdiction should lead the lawyer to conclude that settlement will be the most reasonable way to achieve the client’s goals
   4. **Breach of Fiduciary Duties**
      1. Breach of Fiduciary Duty vs. Malpractice
         1. Only professionals can be guilty of malpractice
         2. Fiduciary Duty applies to a larger group, all agents are fiduciaries even if they are not professionals
         3. Breach of fiduciary duty suggests intentional action, conscious
         4. Malpractice suggests negligence
      2. ***Tante v. Herring* (1994)** [preface: is sex with clients a breach of fiduciary duty?]
         1. **Facts**: Tante (Δ) represented Herring (π) in a Social Security Administration proceeding. During course of his representation π, who was married, had an affair with Δ. After the affair was over, π sued Δ for legal malpractice and breach of fiduciary duty, alleging that he used his knowledge of her fragile emotional state to induce her to have an affair, which had caused her emotional distress. COA held that π could proceed on the breach of fiduciary duty claim, Δ appealed
         2. **Issue**: It is an actionable breach of fiduciary duty for an attorney to use information- available to him because of the attorney-client relationship – to his advantage and to the client’s disadvantage?
         3. **Holding**: Yes
         4. **Law**: It is an actionable breach of fiduciary duty for an attorney to use information – available to him because of the attorney-client relationship – to his advantage and to the client’s disadvantage
         5. **Reasoning**: Even if Tante (Δ) was not guilty of malpractice in that this representation to Herring (π) was competent, he still stands in a fiduciary relationship to her. If he used his superior knowledge to her detriment, he may be liable to π for damages resulting from breach of the fiduciary duty to refrain from misusing confidential information
         6. **Analysis**: the problem encountered in this case presents several competing values. On the one hand, attorneys and their clients are consenting adults, who presumably have the capacity to make judgments about their relationships. On the other hand, the two are often unequal in terms of power, and the opportunity for exploitation is manifest. The states vary greatly as to how much leeway attorneys are given to engage in relationships with clients. Some prohibit it entirely. Others, like CA, don’t provide a blanket prohibition, but don’t allow it in family law contexts.
2. **Proving Malpractice**
   1. **Causation and Defenses**
      1. Where alleged negligence takes place in connection with litigation, malpractice π must prove that “but for” lawyer’s negligence, π would have won or done better in their case
      2. ***Viner v. Sweet* (2003)** [preface: proving malpractice in transactional work – causation and defenses]
         1. **Facts**: When the Viners (π) brought a malpractice action against their attorney (Δ), for failure to properly prepare legal documents that would have protected π, Δ argued that the π, in order to prevail in a transactional legal malpractice action, must prove that a more favorable result would have been obtained but for the alleged negligence
         2. **Law**: The π in a transactional legal malpractice action must prove that a more favorable result would have been obtained but for the alleged negligence
         3. **Reasoning**: there is nothing distinctive about transactional malpractice to justify a relaxation of, or departure from, the well-established requirement in negligence cases that causation can be established by the “but for” test. When a business transaction goes awry, a natural target of the disappointed principals is the attorneys who arranged or advised the deal. Natural inclination is for client to want to shift blame, but there is a hurdle to clear. Courts must deny recovery where the unfavorable outcome was likely to occur anyway, the client already knew the problems with the deal, or where the client’s own misconduct or misjudgment caused the problems. Courts are properly cautious about making attorneys guarantors of their clients’ faulty business judgment. Court didn’t agree with COA that litigation is inherently or necessarily less complex than transactional work
         4. **Analysis**: CA SC in this case pointed out that the purpose for the “but for requirement” is to safeguard against speculative and conjectural claims. It serves the essential purpose of ensuring that damages awarded for the attorney's malpractice actually have been caused by the Δ’s conduct
            1. Attorney might not know beforehand what test SC will apply (might be different from what trial court used)
      3. **Ruminations on the “But For” Test in Legal Malpractice**
         1. The “but for” test is commonly applied in both transactional and litigation cases.
         2. Some courts have relaxed the “but for” burden in some fiduciary duty cases
            1. Apply a “substantial factor” test of causation when the former client seeks not the value of the lost claim but the fiduciary’s gains (less stringent test). Remedy being sought is restitutionary to prevent the fiduciary’s unjust enrichment as measured by his ill-gotten gain.
            2. “but for” (more stringent test) where remedy sought is compensation for a loss
   2. **Causation in Criminal Cases**
      1. ***Peeler v. Hughes & Luce* (1995)** [preface: proving malpractice – causation in criminal cases. Lawyer charged with failure to communicate a plea offer that would have avoided any conviction at all. Allegations permit inference that lawyer sacrificed one client to protect another]
         1. **SG**: this is one of the least defensible decisions in the field
         2. **Facts**: Peeler (π) and her husband were indicted on numerous counts of tax-related crimes. She eventually accepted a plea bargain in which all but one of the charges against her were dropped, resulting in a short sentence and a fine. Subsequent to pleading guilty, she discovered that the prosecutor had conveyed to her attorney (Δ) an offer of absolute transactional immunity in exchange for testifying against alleged co-conspirators. This offer was never communicated to her. She sued Δ for malpractice. Trial court granted Δ’s motion to summary judgment, dismissing action. COA affirmed, state SC reviewed
         3. **Law**: A legal malpractice claim may not be brought in the context of a criminal matter absent a showing that the π has been exonerated from the conviction
         4. **Reasoning**: criminal conduct is the only cause of any injury suffered as a result of conviction. Therefore only innocent πs can negate the sole-proximate-cause bar to their cause of action for professional negligence. Thus a criminal Δ who has been found guilty, either by plea or verdict, cannot sue his attorneys for malpractice unless the conviction is later overturned on direct appeal or collateral attack. To hold otherwise would allow the criminal to financially profit from his misdeed, something the law cannot countenance. In this instance, π was convicted through a guilty plea and never even asserted that she didn’t commit the acts for which she was indicted, so she has no action against Δ
            1. **Concurrence**: holding shouldn’t be read as condoning the alleged malfeasance of π’s attorney, which, if true, was reprehensible
            2. **Dissent**: an exception to the rule cited by the court should be made when it can be shown that, but for the alleged malpractice, the Δ would not have been convicted
         5. **Analysis**: the rule cited here leaves a hapless convict with something of a catch-22: if his attorney’s malpractice lands him in prison, he has no recourse against the attorney. The only hope for one in a position such as π found herself would be an appeal or habeas proceeding based on ineffective counsel in violation of the Sixth Amendment. However, even this remedy is probably unavailable to one who plea bargains
      2. **Acquittal, Innocence, or Exoneration?**
         1. A guilty criminal has no right to acquittal
         2. Ohio takes minority view 🡪 allowed person who was guilty and took plea because her lawyer didn’t communicate better offer to her to state a claim
         3. ***Ang v. Martin*** (**SG**: this is the least defensible decision): Ang (π) was being represented in criminal action, lawyer urged π to plead guilty. π fired lawyer, rejected plea, hired new lawyer who represented π and won acquittal. π sued former lawyer, however court held that π had to prove that they were actually innocent (impossible task), even though they have never been convicted and hadn’t plead guilty.
         4. **Assigned Counsel**
            1. SCOTUS has held that nothing in federal law bestows immunity on defense lawyers in private practice who represent indigent Δs
            2. However, where lawyer defending a criminal case in federal court is employed by the federal public defender (an institutional office used in some federal districts to provide indigent defense services), the rule changes 🡪 these lawyers are employees of the US, former client must sue the US
   3. **Damages or Injury**
      1. Some cases allow damages for emotional distress, often for wrongful incarceration as a result of lawyer’s negligence
      2. You can tell someone to lie to the public
3. **Beyond Malpractice: Other Grounds for Attorney Liability to Clients and Third Parties**
   1. ***Petrillo v. Bachenberg* (1995)** [preface: Control of Quality: remedies for professional failure. Beyond malpractice: other grounds for attorney liability to clients and third parties]
      1. **Facts**: Developer Rohrer Construction and its attorney, Herrigel (Δ), solicited from a soils engineer tests regarding the suitability of certain real estate for the placement of a septic system. Two series of tests were performed that indicated that the land was unsuitable. A report was compiled from the two series of tests that gave the impression that the land was in fact suitable. The land was eventually purchased at a foreclosure sale by Bachenberg (Δ), who then retained Herrigel (Δ), who passed on to him the erroneous report.
         1. The land was then sold to Petrillo (π) for commercial development. π, who had been given a copy of the report during her negotiations to purchase the property, hired an engineering firm to conduct her own tests, which showed that the land could not be brought into compliance with local ordinances and was undevelopable.
         2. π then sued Bachenberg (Δ) for return of the purchase money, and Herrigel (Δ) for providing the erroneous report
         3. trial court dismissed claim against Herrigel (Δ), COA reversed, NJ SC reviewed
      2. **Law**: Attorneys may owe a duty of care to nonclients when the attorneys know, or should know, that nonclients will rely on the attorneys’ representations and the nonclients are not too remote from the attorneys to be entitled to protection
      3. **Reasoning**: At common law, an attorney was not liable to a nonclients due to lack of privity. This rule has been slowly replaced with one that looks more to the overall circumstances to ascertain whether the attorney should have liability imposed on him for injury to a nonclient. Generally speaking, if a lawyer negligently prepares a document and such document is foreseeably to be used by third parties, such parties have recourse against attorney. Here, it was foreseeable that a purchaser of the property would rely on the soils report in making a purchase decision, so Herrigel’s (Δ) duty extended to π. A jury should have the opportunity to decide effect of Herrigel’s (Δ) alleged negligent misrepresentation
         1. **Examples**: opinion letters and securities offering statements
      4. **Dissent**: π didn’t rely on any opinion by Herriger (Δ), he owed no duty of care to her
      5. **Analysis**: The Washington SC has formulated a balancing test to determine when lawyers may be held liable to nonclients. Factors to be considered include the extent to which the transaction was intended to benefit the π, the foreseeability of harm to the π, and the closeness of the connection between the Δ’s conduct and the injury. Policy considerations include prevention of future harm and the extent to which the legal profession would be unduly burdened by a finding of liability
   2. **The Expanding Universe in Professional Liability**
      1. ***Trask v. Butler***: balancing test for imposing third-party liability on lawyers for professional work. Listed following factors in balancing test:
         1. Extent to which the transaction was intended to affect (benefit) π
         2. Foreseeability of harm to π
         3. Degree of certainty that the π suffered injury
         4. Closeness of the connection between the Δ’s conduct and the injury
         5. The policy of preventing future harm; and
         6. The extent to which the profession would be unduly burdened by a finding of liability
   3. **Consumer Protection Laws**
   4. **Criminal Law**: lawyers can subject themselves to criminal liability for furthering a client’s crimes (laundering, overbilling or billing through kickbacks schemes)
   5. **Fraud, Negligent Misrepresentation, Etc.**
      1. *Slotkin v. Citizens Casualty Co.*: Hospital was sued by parents of child. Hospital’s counsel said that max insurance was $200K (when it was really $1M). Court held counsel liable because of his false representation
   6. **Abuse of Process**: occurs when legal process is used to attain a collateral objective beyond that anticipated by the process. An ulterior motive does not alone satisfy the requirement for an action in abuse of process; a definite act or threat outside the process is required. An abuse of process can occur even though there is probable cause to bring the action and the original action terminates in favor of the π
      1. Using process to harass may be actionable
   7. **Malicious Prosecution**: tort, generally established if the π can show that the Δ brought an action against her, that the π won that action (or favorably settled), that the action commenced without probable cause, and that the Δ initiated the action with malice
      1. The lawyer for the malicious prosecution Δ will be liable, too, if she also acted maliciously and without probable cause
   8. **Helping Fiduciaries Breach Their Duties**: a lawyer for a fiduciary doesn't have any greater ethical obligation toward the beneficiary than the lawyer has toward any other third party
   9. **Inducing Breach of Contract**
   10. **Invasion of Privacy**
   11. **Violation of Escrow Agreement**
4. **Discipline**
   1. ***In re Warhaftig* (1987)** [preface: control of quality: remedies for professional failure – discipline – acts justifying discipline: dishonest and unlawful conduct]
      1. **Facts**: Attorney Warhaftig (Δ), faced with serious financial pressures, began appropriating client funds. For the most part, the funds were returned. When the State Bar (π) discovered Δ’s acitivies, it instituted disciplinary proceedings. Δ argued in his defense that he had only meant to “borrow” the monies taken, not permanently misappropriate them. Based on this distinction, the State Bar (π) recommended a reprimand but not disbarment. State SC reviewed the conclusions
      2. **Law**: An attorney may be disbarred for taking fee advances out of client funds, even if he did so with the intention of returning the funds
      3. **Reasoning**: An attorney who knowingly misappropriates client funds must be disbarred. The distinction made by the State Bar (π) in this instance is misplaced. Misappropriation is prohibited, whether or not the funds are “stolen” or “borrowed.” A bank teller can hardly use this excuse if his employer finds him taking funds, and an attorney should be held to at least as high a standard. Here, Δ knowingly took funds to which he wasn’t entitled, and this ends the inquiry.
         1. Mitigating factors in this case were insufficient, Δ disbarred
      4. **Analysis**: the court did admit that Δ may not have been as culpable as if he had had no intent to repay his client’s money, but found the difference to be only negligible. Of course, to trigger automatic disbarment, the misappropriation must be knowing. Merely careless bookkeeping or accidental use of client monies will not subject an attorney to disbarment, but may result in sanctions for failure to protect client property
   2. ***In re Austern* (1987)** [preface: acts justifying discipline: dishonest and unlawful conduct]
      1. **Facts**: Austern represented client (Viorst) who was attempting to arrange a condo conversion. Austern attended meeting between his client and prospective purchasers. The purchasers, suspicious of client’s motives, demanded that he make a good faith money deposit into an escrow account. Client wrote a check for $10K. Client later admitted to Austern that the check was drawn on an account which contained no funds. Despite this knowledge, Austern helped effect the transaction. He was later investigated by the Board on Professional Responsibility, which recommended censure for his part in the deal. COA agreed, renewed the recommendation
      2. **Law**: an attorney may be censured for facilitating a real estate transaction despite knowledge that a client’s deposit to third parties consisted of a check drawn on nonexistent funds
      3. **Reasoning**: An attorney can't further an illegal or fraudulent purpose. Client’s use of a worthless check as earnest money constituted a fraud on the prospective purchasers. Austern, with knowledge of this fraud, helped facilitate the transaction in clear violation of the rules. The only appropriate course of action for Austern would have been to advise client to cease and upon client’s failure to do so, withdraw. His failure to do so was Censurable 🡪 affirmed
      4. **Analysis**: an attorney is permitted to represent a client who has already engaged in illegal or fraudulent conduct. However, an attorney cannot represent a client whom one knows to be engaging in ongoing illegal or fraudulent conduct. All jurisdictions have rules identical to or similar to those invoked here. Austern’s conduct would have been censurable almost anywhere
   3. ***In re Jordan Schiff*** (1993) [preface: discipline – racist and sexist conduct]
      1. **Facts**: Disciplinary hearing held after Δ allegedly violated the code of ethics by using obscene, explicit, gender-specific vulgarities to harass opposing female counsel during a deposition
      2. **Law**: Attorneys who direct dirty, discriminatory, gutter language at opposing counsel to harass counsel on the basis of gender will be subject to sanction for violation of the rules of professional conduct

**XIV Control of Quality: Nonlawyers on the Law Industry and Related Issues**

1. **Nonprofit Entities and Intermediaries**
   1. **Public Interest Organizations** 
      1. ***NAACP v. Button*** (1963) [preface: enabled the growth of the public interest law movement. The public interest bar wouldn’t exist in its current form without the protection *Button* affords. *Button* facilitated the emergence of firms that pursue social and political change through litigation]
         1. **Facts**: Virginia chapter of NAACP had for years engaged in the activity of locating (soliciting) potential πs to be litigants in suits aimed at fulfilling the NAACP’s (π) political objectives of ending segregation. In response, the state of Virginia (Δ) enacted an anti-solicitation law prohibiting the agent of an organization or individual from soliciting clients for lawsuits in which the organization or individual paid for the lawyer in connection with an action in which the organization or individual was neither a party nor had a pecuniary interest. As the attorneys to whom the NAACP (π) would refer potential litigants were usually on the NAACP (π) staff, this effectively prohibited the NAACP’s (π) solicitation procedure. The NAACP (π) challenged this as violative of the First Amendment
         2. **Law**: A state may not constitutionally prohibit the solicitation of clients by an agent of an individual or organization that retains a lawyer in connection with an action in which it is neither a party nor has a pecuniary interest
         3. **Reasoning**: Solicitation is covered by the First Amendment, since abstract discussion is not the only species of communication protected by the First Amendment; vigorous advocacy is protected by it as well. Litigation is more than a vehicle for resolving private disputes; it is a means for achieving lawful political ends, and in that regard it is political expression. Under the conditions of government, litigation is sometimes the only practicable way an unpopular group can petition for redress of grievances. The First Amendment protects certain forms of group activity, and using litigation to achieve political ends is one such form of activity. That is, association for litigation is a form of political association. Under the statute at issue, a person who advises another that his legal rights have been infringed and refers him to a particular attorney or group of attorneys for assistance has committed a crime, as has the attorney who knowingly renders assistance under such circumstances; the statute thus poses the grave danger of unconstitutionally eliminating any discussion relating to the institution of litigation on behalf of unpopular minorities. Since the use of litigation is a constitutionally protected activity, Virginia (Δ) must show a compelling reason for its existence. The proffered justification is the state interest in regulating the legal profession and against solicitation and barratry. While these are important objectives, the type of solicitation at issue here differs materially from solicitation of a for-profit nature, which a state may well be able to prohibit. Such is not at issue here. Since a compelling reason for the prohibition has not been shown, it is constitutionally defective. Reversed
      2. **Maintenance, Barratry, Champerty, and Change: What Did *Button* Decide?**
         1. **The common law background**
            1. **Maintenance**: improperly stirring up litigation and strife by giving aid to one party to bring a claim without just cause or excuse
            2. **Barratry**: offense of frequently exciting and stirring up quarrels and suits between other individuals
            3. **Champerty**: unlawful maintenance of a suit, where a person without an interest in it agrees to finance the suit, in whole or in part, in consideration for receiving a portion of the proceeds of the litigation
         2. **The constitutional context**: Analysis changes when party being accused of champerty is able to assert constitution protection for its activities
      3. ***In re Primus*** (1978) [preface: builds on *Button*. Gives constitutional protection to public interest lawyers who solicit clients to serve as πs in litigation. Broadens scope of *Button*]
         1. **Facts**: Primus, an attorney, in conjunction with the ACLU, forwarded a letter to a person who was sterilized as part of a state regulatory practice conditioning entitlement to welfare payments on sterilization. The letter advised the person that she had a claim against the doctor who performed the procedure, and that the ACLU had a legal staff that could perform free legal services for her. Person declined to pursue matter, but State Bar, under a disciplinary rule prohibiting solicitation by letter, published a letter of reprimand against Primus.
         2. **Law**: A state may not prohibit attorneys from mailing letters to potential clients advising them of their legal rights and of the opportunity to receive free legal services
         3. **Reasoning**: When legal services are performed as part of an attempt to further a political agenda, such activities constitute a form of expression protected under the First and Fourteenth Amendments. State abridgements on such activities must be narrowly tailored to serve a compelling interest. Here, there can be little question but that Primus’ solicitation was part of an effort to advance a political program; the ACLU is well known for taking political positions, and the fact that it might benefit at some later date because of a regulated lawsuit does not alter this. Consequently, Primus’ letter was a form of protected expression. The proffered state interest is the prevention of overreaching and intimidation of potential clients. While a state has a compelling interest in prohibiting this behavior, it has not been shown that a blanket prohibition on solicitation by mail is necessary to achieve this end. Since the state prohibition is not narrowly drawn, it is unconstitutional. Reversed.
         4. **Analysis**: this case was decided the same day as *Ohralik v. Ohio State Bar Association* (1978). These cases seems to show that a state can prohibit completely all attorney in-person solicitation. All other solicitations, if politically motivated, must be reviewed on a case-by-case basis.
   2. **Labor Unions**: the union cases constitutionally empower unions to buy legal services more cheaply through group purchasing power
      1. ***United Transportation Union v. State Bar of Michigan*** (1971)
         1. **Facts**: The United Transportation Union (Δ) instituted a program to assist its members who had causes of action under the Federal Employers’ Liability Act. The Union would refer its members to selected attorneys, who had agreed to charge a fee of no more than 25% of total recovery. The Michigan State Bar (π) challenged this practice as illegal “solicitation” of lawsuits.
         2. **Law**: A labor union can assist its members in obtaining low-cost legal services
         3. **Reasoning**: The First Amendment permits groups to unite to assert their legal rights as effectively and economically as possible. An organization may also employ attorneys to represent its members. From this it follows that an organization may also refer its members to attorneys. The injunction at issue here not only prohibited the Union from so doing, but also enjoined it from doing various acts incident thereto, such as providing information concerning the availability of legal service and compensating individuals for the time spent providing such information. If an organization is to be permitted to assert its legal rights, the activities enjoined in this particular case must also be permitted. Reversed
         4. **Analysis**: The Court relied principally on *Button*. A difference existed between the situation in *Button* and the present case, in that *Button* involved ideologically motivated litigation as opposed to the purely economic interests at issue here. It is not clear whether this distinction was raised, however it is unlikely to have altered the holding
   3. **For-Profit Enterprises**
      1. **Should we let Nonlawyers be law firm Partners?**
      2. **Multidisciplinary Practice (MDP)**
      3. **Issues Under Study Today: Ethics 20/20**

**Part Five: First Amendment Rights of Lawyers and Judicial Candidates**

**XV Free Speech Rights of Lawyers and Judicial Candidates**

1. **Public Comment About Pending Cases**
   1. **Some Further Context**
   2. ***Gentile v. State Bar of Nevada* (1991)**
      1. **Facts**: Gentile (Δ), who spoke to the press about a pending prosecution, contended that such speech was constitutionally protected and could only be prohibited when it constituted a clear a present danger to a fair trial
      2. **Issue**
         1. Is a state’s rule of conduct unconstitutionally void for vagueness where it is written in such a way that it doesn’t clearly demarcate the line between permitted and prohibited conduct?
            1. **Law**: a state’s rule of conduct is unconstitutionally void for vagueness where it is written in such a way that it does not clearly demarcate the line between permitted and prohibited conduct
         2. Must public utterances by an attorney present a clear and present danger to a fair trial to be subject to prohibition?
            1. **Law**: public utterances by an attorney need not present a clear and present danger to a fair trial to be subject to prohibition
      3. **Reasoning**
      4. **Analysis**: Attorney freedom of speech issues usually arise in the context of advertising, a form of commercial speech. The impact of the First Amendment on commercial speech is somewhat different to that involved here. The analysis used here is not necessarily applicable to advertising cases
   3. **Defamation Claims**
   4. **Defamation and Technology**
2. **Judicial Campaign Speech**
   1. ***Republican Party of Minnesota v. White*** (2002) [preface: this opinion addresses the constitutionality of a limitation on the campaign speech of judicial candidates, the “announce clause,” which forbids a judicial candidate to announce his or her views on disputed legal or political issues]
      1. **Facts**: the state’s highest court adopted a canon of judicial conduct that prohibited a candidate for judicial office from announcing their views on disputed legal or political issues (announce clause). While running for associate justice of that court, π filed suit seeking a declaration that the announce clause violated the First Amendment
      2. **Law**: the First Amendment prohibits a state’s judiciary from prohibiting candidates for judicial election in that state from announcing their views on disputed legal and political issues
      3. **Reasoning**
      4. **Analysis**: the decision here presents the difficult issue of whether the restrictions on certain statements made by candidates for judicial office are impermissible content-based restrictions, or permissible content-based restrictions that survive strict scrutiny based on the government’s strong interest in preserving judicial independence and impartiality (and the appearance thereof). Hence, the majority focuses on the content of the speech being regulated, whereas the dissent focuses on the government interest. In 2007, the ABA changed its Code of Judicial Conduct to satisfy the decision in this case by eliminating the announce clause and providing an expanded pledges or promises clause
      5. **Gray Areas Post**-***White***: In 2007, ABA changed its Code of Judicial Conduct, eliminating the “announce clause,” and including an expanded pledges and promises clause.
         1. **Rule 4.1(A)(13)**: a 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. Same limitation applies to sitting judges
         3. **Rule 2.11(A)(5)**: acts as backstop. Requires a judge to disqualify themselves if the judge, while a judge or a judicial candidate, had 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
         4. **Result**: so while there may be a constitutional right to speak that overrides the limitations in the code’s new language, there is no constitutional right to sit in a particular matter