

NYU School of Law Outline:
Professional Responsibility and the Regulation of
Lawyers, Stephen Gillers

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1 Introduction

- Legal ethics is a misnomer. Besides, there isn't "legal ethics" anymore, it's "The rules of professional conduct." Really, it's "the law of lawyering."
- This is your second most important class, after whatever your practice area is.
- The rules of the law of lawyering fall into two categories:
 - Micro: governing an individual lawyer's conduct in the representation of a client. Confidentiality, fiduciary duties, duties of the agency relationship, conflicts of interest, and duties to third parties.
 - Macro: deals with the structure of the industry—selling a product, the product being information and judgment. In every jurisdiction except Washington, D.C., a person not a member of some jurisdictional bar association cannot be an equity partner of a law firm, or manage a firm. (D.C. has a special setup; non-lawyers can have equity interest, as long as the lawyers control the nonlawyers and the business is simply to practice law.)
- Note how Big Media is dying, thanks to the Internet. And just like Big Media, lawyers *sell information*.
- The Texas Bar Association went to Federal Court over Quicken Family Lawyer, despite lawyers mostly doing routine work (Blumberg forms for co-op sales, for example).

- So, things are changing. But knowing the rules is still the baseline.
- Notes: The ABA rules are “the dominant imprint on the rules governing lawyers.” They will be changed (in some states more than others—New York and California are the most altering) but they are the baseline. Rules will be marked in *italics*

2 The Attorney-Client Relationship

2.1 Confidentiality

- *Rule 1.1: Lawyers must be competent.* Really counts in malpractice actions, but briefly touched upon here.
- *Rule 1.6: (a): Lawyers shall not reveal information relating to the representation of a client without informed consent, implicit authorization because it’s needed to represent the client, or because it’s permitted by paragraph (b).*
- *(b): Lawyers may reveal information if it’s necessary...*
 - *To prevent death or substantial bodily harm.*
 - *To prevent the client from committing crime or fraud that will harm the financial or property interests of others, and in furtherance of which the client is using or has used the lawyer’s services.*
 - *To get legal advice about the Rules.*
 - *In a defense when the client sues the lawyer.*
 - *To comply with law or court orders.*
- *Rule 1.0(e): “Informed consent” means agreement to a course of conduct after the lawyer has communicated adequate information and explanation of the material risks and the reasonable alternatives to the course.*
- *Perez v. Kirk & Carrigan:* Perez drives a Coke truck, the brakes fail, and 21 children die. Perez is visited in the hospital by K&C, the bottler’s lawyers. He gives them a statement, believing they’re his lawyers. They turn his statement over to the DA. He’s indicted, and acquitted, but sues the lawyers.
 - K&C have several defenses, which the judge shoots down:
 - * “He wasn’t our client.” The judge answers that there was an *implied* attorney-client relationship, because a reasonable person, seeing two lawyers saying “the bottler hired us, and we’re lawyers” to the driver would think they were hired to defend the driver too. They could have been specific—“we represent the bottler, not you”—but they didn’t.

- * “There were strangers present, so there is no privilege, and then no obligation.” Judge: “There is a difference between confidentiality and privilege.” Even if there wasn’t a *privilege* shield, there were still ethical obligations.
 - The ethical obligation differs from privilege. First, as in *Perez*, the information may not be privileged because of third-parties. But still, the duty of confidentiality can attach.
 - Privilege is a shield against forced disclosure. Confidentiality is not a shield, it’s an obligation not to voluntarily reveal.
 - *Rule 1.18* outlines duties to prospective clients—so a potential client can shop around.
 - NOTE; The violation of the ethics rules was *not* the theory of liability. The ethics rules do not create a cause of action.
 - The liability was the violation of the law of fiduciary duty, which caused emotional distress.
- “My Client is HIV Positive”: Your client tells you he’s HIV positive, and he’s having sex (possibly not protected) with your former client, the one who’s paying bail and legal fees, but doesn’t want her to know.
 - Recall *Rule 1.6(b)(1)*: *Revealing information is allowed to prevent reasonably certain death or substantial bodily harm.*
 - Is this confidential, because it’s relating to representation? Yes. It was told to aid in a bail application. It’s also privileged, from client to lawyer.
 - The lawyer can’t decide what is legally relevant and what isn’t. The issue is factual relevance from the layperson’s perspective.
 - Being paid by Anna to represent Ken does not make Anna your client, anyway.
 - What about this: the client is “not the cautious type,” but how do you know?
 - Most lawyers will not reveal, in tests done by Gillers.
 - “All’s Not Well”: Ben represents the Winklers in selling a home, but then learns about the “well problem.”
 - Is this confidential? The Winklers are not clients. But then, “relating to the representation” is not temporal.
 - Perhaps Ben should talk to the Winklers and make sure it wasn’t that Copeland Engineering sent the wrong file. (But they probably wasn’t. Let’s assume the Winklers pulled a fast one.)
 - Are or were the Winklers guilty of fraud? *Rule 1.6(b)(2) and (3) require the conduct that may or has resulted in injury be a crime or fraud.*

- We need to examine the substantive law.
- Practically speaking, the incentive structure says to reveal. Being sued for assisting a fraud is even worse than the client reveal.
- Logan Alton: Lawyers knew for twenty-five years that Alton was innocent but couldn't talk.
 - The lawyers also claim that the DA was committed to a “Logan did it” theory.

2.2 Entity Clients

- *Rule 1.13 discusses entity clients, like corporations and companies. They're entitled to the same representation and protections as a biological client.* That said, there's no direct communication with a lawyer—the constituents, who the lawyer might or might not be able to represent personally, communicate.
- There are two typical justifications for protection rules: normative (respect the integrity and autonomy of the person) and empirical (encourage candidness with the lawyer). Neither applies here.
- *Rule 1.13(f) requires that a lawyer, when dealing with the constituent of a corporate client, explain the difference between a corporate client and the constituent.* This is a sort of “corporate *Miranda* warning.”
- Of course, if you warn a constituent, he or she might clam up.
- There are various tests outlined for determining who qualifies as part of the privilege:
 - “Control group” test (*Upjohn* at the Sixth Circuit, overturned on appeal).
 - *Upjohn*: “Scope of the duties” test.
 - *Samaritan Foundation*: “Mere witness” test.
 - Restatement: “Between an agent of the organization and the lawyer (or lawyer's agent) and concerning a legal matter.”
- *Upjohn v. United States*: Company investigates bribery of foreign authorities. Corporate counsel talks to all levels of employee—workers, low management, line management, senior management. IRS subpoenas the records, and company claims privilege.
 - The Sixth Circuit set up a “control group” test: only those “officers and agents responsible for directing the company” are protected.
 - The Supreme Court rejected that test, saying that if counsel's conversation concerned “matters within the scope of the duties of the employee,” the conversation is privileged to the company.

- The Court says that the government is not without options. Facts are privileged—the IRS can interview the same people the general counsel did. (It didn’t touch on the fact that there’s no way those employees would be candid.)
- Of course, the “scope of the duties” test is binding to federal cases. But states, ah.
- *Samaritan Foundation*: Arizona state statute. Medical malpractice case, with various nurses and orderlies interviewed as part of the investigation. None of those were charged with negligence in their own rights, just the doctors. Plaintiff in malpractice suit subpoenas the hospital lawyers’ notes from the interviews with the nurses and orderlies.
 - The Arizona Supreme Court concludes that if the lawyers initiated the communication, and if the facts “concern[] the employee’s own conduct within the scope of his or her employment” it’s privileged.
 - However, it excluded communications from those who were “mere witnesses” (and just happened to be employees).
 - So in the case at bar, the interview notes were not privileged.
- The Restatement is about as broad as it can get, being the sort of extreme end of *Upjohn*.
- “Slip and Fall”: Someone slips in a department store. Seven people are interviewed.
 - *The Parties*
 - * Walton: Plaintiff.
 - * Lundquist: Lawyer for plaintiff.
 - * Tracy’s: Defendant department store.
 - * Parr: Assistant GC for defendant.
 - *The Tests*
 - * “Control Group”
 - * *Upjohn*
 - * *Samaritan Foundation*
 - * Restatement
 - Todd: Investigator, agent of Parr.
 - * As Parr’s agent, the privilege applies as if Todd was the lawyer himself. Nothing doing from that end.
 - Burkow: Head of maintenance.
 - * “Control Group”: Maybe, maybe not. Up to the defendant, claiming privilege, to establish.
 - * *Upjohn*: Yeah, as maintenance is within the scope of the duties.

- * *Samaritan Foundation*: Probably, as it was related to the employment.
 - * Restatement: Absolutely.
 - Morse: Floor waxer.
 - * “Control Group”: No way.
 - * *Upjohn*: Yeah. Waxing being within the corporate duties.
 - * *Samaritan Foundation*: Definitely. Here, it’s the same as *Upjohn*.
 - * Restatement: Absolutely.
 - Sandstrom: Salesperson who was on break.
 - McCormick: Buyer for the rug department, in the store on his day off.
 - * “Control Group”: Not a chance.
 - * *Upjohn*: Maybe. They’re employees interviewed so that the company can get advice.
 - * *Samaritan Foundation*: No. This is the exact situation in *Samaritan*.
 - * Restatement: Yeah, probably.
 - Corcoran: Former employee who had established the waxing protocol.
 - * There could be a vicarious liability issue, if she mis-established the protocol or some such. But probably a bit of a longshot.
 - Rivera: President of the company that supplies the wax.
 - Kuhl: Customer shopping in the store.
 - * These are not employees, so nothing protects. But a clever lawyer might say that *Upjohn*’s scope test covered wax in general, and so roped in Rivera. Long shot though.
 - Note that Moore might think “if I tell Todd the truth that I overwaxed, and it’s not privileged, that’ll make the company liable and threaten my job. But if it’s privileged I can tell the truth.”
 - That’s what the whole point of the debate is.
- The courts have suggested that bad purpose—retaining a lawyer to advance a crime or fraud, for example—can undo privilege.
 - But when the other side alleges bad purpose, and that there’s no privilege. . . how do we make the pre-trial determination whether to release the communications on the basis of bad purpose?
 - There is a secondary burden in some courts (including the Second) to prove the crime-or-fraud argument: the opponent of privilege must show *reasonable cause to believe* that the purpose of the communication with the lawyer was *in furtherance of* a crime or fraud.

2.3 Agency

- The law can bind the lawyer to the client, and make the client responsible for the lawyer's conduct. See *Taylor v. Illinois* (if your lawyer willfully fails to reveal a witness's identity, your Sixth Amendment rights haven't been violated) and *S.E.C. v. McNulty* (A sophisticated client should be diligent in communicating with his lawyer).
- Your remedy may be to sue your lawyer, but you don't escape the initial lawsuit.

2.4 Fiduciary Duty

- This isn't arm's length. Once you create an A-C relationship, you have to treat the client as your friend.
- Your interests don't count. Just your client's.
- If your interests interfere, you can't take the case.
- If the interests of *other clients* interfere, you shouldn't have the case either.

2.5 Inform and Advise

- *Nichols v. Keller*: A man injured on the job goes to a worker's compensation lawyer and says he got hurt. They don't tell him he also has a tort claim, and then the statute runs out.
 - The court says that the lawyers should have advised him about the tort claim, and said he had to go elsewhere for it.
 - California has even extended that logic to lawyers certified to represent a class—they have to consider other theories of liability even if they won on the first one.
- “In a Box”: Font & Blue knows something about Endicott, the about-to-be business partner of client Marsh. What can the lawyer say?
 - He can't tell Marsh without mentioning Font & Blue.
 - He should get consent.
 - The firm probably can't represent Marsh anymore.
 - They can't just not tell the partner working for Marsh—knowledge of one lawyer imputes the firm, and besides, the lawyer has met with Marsh and helped out.
- A recent case actually had a situation like this—the lawyer didn't say anything.

- There is no excuse of a duty to inform based on proximate cause—we can’t speculate on whether another lawyer would have the information, we have to inform what we have.
- Note also that giving percentages can be misleading.

2.6 Autonomy

- The rule used to be that the client handles ends, and the lawyer handles means. That’s changed.
- “Ms. Niceperson”: The lawyer has a client to consider, and the opponent lawyer is about to screw up. She probably does need to tell her client—or at least maybe undo the comfort level given to the opponent? This one got a lot of pushback from lawyers on CLE.
- “Memo from GC”: Is it serving the interests of the client to focus on diversity rather than quality?
- “Accept the Offer”: Options include bringing in a financial advisor, asking for a provisional agreement to make sure this is worked out, and then, as a nuke, withdrawing.
- *Jones v. Barnes*: Does defense counsel assigned to prosecute an appeal have a constitutional duty to raise every single issue the defendant asks to raise?
 - Court: Nope. That would be second-guessing.
 - Note—this is probably wrong. Barnes did have the final call. But did that screwup rise to the level of a Constitutional violation?
- *Olfe v. Gordon*: The obligation to tell the client can be grounded in both tort and contract. And screwing up means the lawyer can be liable.
- Keep in mind *Rule 1.2(a)*: *The lawyer abides by the client’s decisions concerning the objectives of representation, and consults with the client for the means.*
- Also, *Rule 1.4(a)(2)-(3)*: *The lawyer consults with the client about the means and keeps the client informed.*
- Finally, *Rule 1.4(b)*: *The lawyer explains a matter to the extent necessary to allow the client to make informed decisions.*

3 Legal Fees

3.1 Contingency Fees

- The average person doesn’t exactly “shop around” for lawyers. As a consequence, states adopted rules to protect clients regarding fees.

- The most common rule is a cap on the amount of a contingent fee in personal injury cases.
- Commonly, the rule is that the maximum amount a lawyer can ask for is 1/3 of the recovery.
- Brickman, O'Connell, and Horowitz have argued that this structure is not fair to the client; there should be a lower cap on "first money," because that didn't involve work on the lawyer's part.
- Sometimes, a defendant makes an offer right away, or after just a little work, after all.
- The proposal:
 - When the plaintiff hires you, you have 90 days to make a demand to the defendant.
 - If you don't get a response within those 90 days, you continue as normal.
 - If you do get an offer within those 90 days, and the client accepts, your contingency fee is no more than 15%.
 - This is designed to cap contingency fees on first offers more, commensurate with the less work the lawyer would have done.
- Argument: This will make plaintiffs' firms go out of business. Counter-argument: Plaintiffs' lawyers have an interest in early settlement, so the per-hour compensation in settling is higher for early settlements.
- The proposal died in California and stayed that way.

3.2 Mandatory Pro Bono

- *Rule 6.1: A lawyer should aspire to render at least 50 hours of pro bono work annually.*
- Lawyers have a monopoly, after all.
- However, the best the rule can do is aspirational. Anything stronger fails to pass.
- The alternative is to file a document with the court—so this is a rule of shame.

4 Concurrent Conflicts

- We will encounter conflict problems. At the very least, office, colleague, adversary lawyers, if not our own.

- They are highly technical, and often have no *mens rea* requirements.
- But while they are highly technical, they're also the closest legal requirements come to literary analysis.

4.1 Client-Lawyer Conflicts

- *Rule 1.7: A lawyer shall not represent a client the representation involves a concurrent conflict of interest, as defined by the representation being directly adverse or by a significant risk that the representation will be materially limited by other responsibilities.*
- This is a default rule. *It can be overcome by four factors together: reasonable belief that competence and diligence are possible, no other legal prohibition, no actual representation of both sides of a matter, and informed consent in writing.*
- “Lawyer, Realtor”: This imputes the “significant risk” factor—you’re trying to get a better deal for both sides. A jury will be asked to find a possibility of divided focus. Can you really advise one side to walk away?
- Note that there can be a violation without an actual problem.
- This is a policy judgment—the temptation is too great in some cases that we don’t want the lawyer to even run the risk.
- Another interest being served is client comfort, candor, and reliance on the lawyer. If we had too much conflict permissibility, clients might be more circumspect.
- *Matter of Neville*: Neville represented broker Bly in other matters, and then purchased options in Bly’s properties. Then, he wrote a contract involving Bly, Neville, and another party and a land swap deal.
 - *Rule 1.8(a): You can’t enter a business transaction with a client, or knowingly acquire ownership or interest adverse to a client, unless the transaction and terms are fair and clearly disclosed in writing, the client is advised to seek independent counsel and given time to, and the client gives informed consent.*
 - This rule has both substantive (“fair and reasonable”) and a procedural (“disclosed in a manner reasonably understood, advised in writing of the desirability of independent counsel, &c.) obligations.
 - Here, the Arizona Supreme Court found that Neville hadn’t given the full disclosure necessary. He was censured.
 - The lawyer looks to the client as a guardian—and the lawyer has access to the client’s confidential information that other negotiators might not.

- Neville claimed to just be a stenographer, but the Court said that no reasonable lawyer would have advised a client to accept the terms.
- Conflict rules are default rules: the regime the lawyer lives under without a separate agreement, with informed consent and in writing, from the client.
- *Fla. Bar v. St. Louis*: While representing claimants against DuPont for \$59m, his firm accepted more than \$6m to represent them. Disbarred. It doesn't matter what you were thinking, it matters what happened and what the client was aware of.
- *Hager*: Same situation—leading to a year's suspension.
- *US v. Hausmann*: A kickback scheme with a chiropractor (going-rate fees with 20% to Hausmann) led to *indictment* for mail fraud—using the mail to deprive clients of his honest services in violation of the fiduciary duty to clients.
- “Lawyer’s Firm Is Occasional Client”: Probably not a Rule 1.7(a)(1) problem. There is no matter pending. And besides, we’re not adverse to our client, just *their* client.
- But at the same time, there’s an (a)(2) problem: you can’t move for sanctions, for example, against your own client! And there may be a danger from the other side of antagonizing your malpractice lawyer.

4.2 Client-Client Conflicts

4.2.1 Criminal

- The Sixth Amendment right to counsel means *unconflicted* counsel.
- “Murder One, Murder Two”: There’s probably a conflict. Another lawyer could, for example, move to sever trials. But is there a Sixth Amendment claim of ineffective assistance of counsel?
- The *Strickland* test concerned lawyer intent/prejudice, not conflict.
- *Cuyler* asked for a showing of not just conflict of interest, but also *actual adverse effect*.
- On the other hand, *Holloway* said that *a trial judge must investigate claims of an actual conflict of interest when they’re brought to his attention, or convictions get reversed*. This is keeping the trial judges in line, a different scenario.
- And *Mickens* dealt with Saunders, who had been appointed to represent Hall and then to represent his murderer. Saunders didn’t raise the objection, so the *Holloway* rule didn’t apply.

- The *Mickens* dicta suggests that interests between current clients aren't the same as between current and former clients. It's dicta because it's clear this wouldn't have satisfied the *Cuyler* actual-adverse-effect test anyway.
- *Wheat* suggests that sometimes, it's not *possible* for there to be "fully informed waiver," and district courts get broad latitude in determining whether to accept a waiver of conflict.
- "Murder at the Ballgame": If Pontero, the client, can show that Lydia couldn't do what an unconflicted lawyer arguably could (such as the "Pete-did-it" defense), that's the *Cuyler* test for actual adverse effect.
- On the other hand, if Chen made the motion and won, he might face a *Gonzalez-Lopez* problem. The removal of the attorney of choice, if found to be a Sixth Amendment violation, triggers *automatic reversal*.
- There's no way to show how there would be a difference—so the right is violated when counsel is denied. It's not fairness, it's choice.
- Lydia could get a writing from Pontero, and likewise get an independent lawyer.
- Note that in *Wheat*, the bar for conflict was low, but the short time was a factor. And the other safeguard was that Iredale would be added to the team, not necessarily a total substitution.

4.2.2 Civil

- "Will You Represent Us Both": Two minorities passed over for promotion? If the remedy is the job, definitely not. Research the substantive law, determine what the remedy would be.
- And maybe take the job off the table: *Rule 1.2(c) allows a lawyer to limit the scope of representation*. Say flat out that you won't advocate for the job, but you can do the rest!
- *Fiandaca v. Cunningham*: The Fiandaca Class (represented by NHLA) claimed it was denied equal facilities (of prisons). Meanwhile, the Garrity Class (NHLA's again) complained of the conditions at Laconia. When the state offered Laconia to the Fiandaca, NHLA rejected the offer, and New Hampshire claimed conflict.
 - The classes were not opposed, so this must be Rule 1.7(a)(2).
 - In lay terms, if NHLA wasn't representing Garrity, it could have given objective advice about whether Laconia was a good deal. But it couldn't.
 - The Circuit found that the conflict didn't affect the verdict, but it did affect the remedy. So the remedy gets vacated.

4.3 Imputed

- Note that in *Fiandaca* no matter how big NHLA is, *Rule 1.10: Client conflict is imputed to every lawyer in a firm. (But personal conflict is not.)*
- If you're across the table from a party your firm represents, even if it's a whole other lawyer in the firm and the matters are unrelated, that's a violation.
- Informed consent displaces the rules (*Wheat* doesn't apply outside of criminal cases because of the Sixth Amendment factor), so the onus is on the lawyer.
- Rule 1.10(a) might not apply to every Of Counsel in a firm, but certainly every full-timer, partner and associate, regardless of office.
- Does it still make sense, given the size of firms?
- The *Calderon v. Micro* hypothetical: Schmidt is doing Calderon's estate plan, while Mickeljohn is handling a zoning matter for Micro. Calderon and Micro are in litigation.
 1. If neither Schmidt nor Mickeljohn is working on the actual dispute, that's fine.
 2. If Schmidt is representing Calderon in the dispute, that's a problem—it's a Rule 1.7(a)(1) violation requiring informed consent. (The "unrelated matters" scenario.)
 - The justification here is that Schmidt might have ulterior motives and might pull his punches on Micro.
 - In addition, Micro might not trust Mickeljohn fully—reduced trust and openness. "Who are you, my friend or my enemy? What side are you on?"
 3. If 2, and Mickeljohn's work in the zoning matter is related to the Calderon dispute, that's related matters. Probably not going to get consent anyway, but it might not even be possible. Same fears as above, plus direct fear of information getting back to Calderon.
- By the way, an important point: A rule common in many jurisdictions says that when two clients (say, defendants) and their two separate lawyers confer among themselves, this does not sacrifice attorney-client privilege.
- Normally, third parties break privilege, but codefendants and their lawyers have a common interest, that protects the privilege—or, accurately, protects what would otherwise not be protected because of the loss of the privilege.
- It's called "joint defense privilege," but it's not actually a privilege.

- It's not just defendants, either. Plaintiffs, prospective parties, even in some cases *transactional* clients.
- Waiving that can be tricky. California says you can only waive privilege on what you, yourself, said, not what someone else said.
- The arrangement need not be in a writing, but should, outlining who can say what and how it can be waived.
- In some cases, several circuits—Third, Ninth—have found, absent a disclaimer, a fiduciary relationship between lawyer A and client B.
- *Simpson v. James*: The same firm who was handling the sale of a catfish restaurant franchise was advising the investors about an insurance mess...and when asked to restructure the promissory note after some bankruptcy, the firm said they were working for the investors.
 - The court lays out the elements of malpractice: negligence, proximate cause, &c.
 - Oliver and James represented both sides—so they couldn't get both of them the best deal possible.
 - James tried to claim Simpson was never his client, but nobody buys that.
 - Conflict rules deal with risk avoidance and minimization. But how does a conflict become liability? Isn't that a distinct issue?
 - Yes. Here, this was negligence, which Simpson argued arose out of the conflict of interest. The conflict led to neglecting duty, which was negligence.
 - Dueling experts can suggest that the lawyers were restricted, and didn't do (or think of doing) some things they should have tried. Such as attaching the insurance proceeds from the fire.
 - Moreover, there needs to be causation—the jury here found that if an unconflicted lawyer had tried to get what Oliver and James didn't, *that lawyer would have succeeded*. That's a high bar, but it happened here.
 - If Oliver had gotten everything Simpson wanted, there couldn't have been malpractice. The bar association might have had some harsh words, though.
 - The violation of the conflict rule frames the behavior of the lawyers in context, and allows Simpson to argue for a certain state of mind.
 - There are other remedies, such as disbarment or forfeit of fee.
- “They're on the Same Page”: The money, the contacts, and the manager. All are on board. Why do they need three lawyers?

- Issues include: Equal ownership? Who helps whom? What if people want salaries?
- Penelope can't resolve the differences. But she might become a scrivener: lay out the options and issues, tell them what the problems are, draft the language. . . and prepare informed consent forms.
- There are categories of conflicts. In *Calderon*, Micro might be willing to agree about adversity "concerning unrelated matters, not involving litigation."
- Consent need not be to a single particular conflict. Large firms often say "we'll take you as a client, but you must agree that we may be adverse to you in any unrelated, non-litigation matter where the lawyers adverse to you are not representing you."
- *Rule 1.7(b) says that almost anything can be waived with informed consent, confirmed in writing, except active P vs. D situations. You can't represent both sides of a courtroom, period.*

5 Successive Conflicts

5.1 Private Practice

- *Rule 1.9(a): A lawyer who has formerly represented a client in a matter shall not thereafter represent another in the same or similar matter in which the former client's interests are materially adverse without informed consent in writing.*
- *Analytica, Inc. v. NPD*: NPD hired S&F to handle a financial transaction, and the employee in question quit, formed his own company, and hired S&F to sue NPD on financial matters.
 - A substantial relationship is defined by "he could have obtained confidential information in issue 1 that is relevant to issue 2."
 - The rule is not "did" but "could have."
 - The same relevant information means substantially related.
 - The judges don't look through files, so the best that can be done is the guesswork.
- "Divorce and Default": Slipshod is not Patrick, and Wumco is not Lilah or Patrick. The opposition here is to Slipshod, not the former client. At the same time, the same interests are in the negotiation. So that's that.
- "Do I Still Owe the Record Store?": Well, she could have obtained confidential information about the noise and the lease. Who knows about the zoning. Maybe on the competitor.

- *Former clients get less protection than current clients. You may not be adverse to a current client on any matter. But you may be adverse to a former client on an unrelated matter.*
- There is a “hot potato” rule: you can’t drop a client (turn them from current to former) just to avoid a conflict (by taking an unrelated claim against the client).
- But there is also a “thrust upon” exception. If the conflict arose not due to the law firm (mergers and acquisitions, or operation of law), the firm can drop one of the clients or get consent.
- Note *Rule 1.9(c) mimics responsibilities to current clients in Rule 1.6(a) and 1.8(b): you shall not use information relating to the representation of a former client to the disadvantage of that client, except as you could to a current client or if the information is generally known, and you shall not reveal information relating to a former client except as you could to a current client.*

5.2 Laterals and Imputed Disqualification

- Even summerers have a possible conflict of interest.
- In a firm with no laterals, conflicts are imputed.
- But do we impute a lateral lawyer’s personal conflicts and client conflicts to the new firm?
- An early Second Circuit case said that when a lateral left, if she hadn’t ever worked on a matter, she shedded the conflict. But if she has worked on it?
- “You Don’t Know Anything”: Lakoff worked on the defenses of AxiMartin in the two age discrimination cases—is that substantially related to the sex discrimination case?
- An argument has been made that anything the lawyer learned would be learned in discovery anyway, but that got shot down on “you have a head-start” grounds.
- There is also a “playbook doctrine” suggesting that if you spent twenty years developing a strategy for, say, ERISA cases, you can’t attack the company on ERISA doctrine. There are two underlying presumptions (which are rebuttable) in the lateral-lawyer doctrine, at least in some circuits (such as Illinois/the 7th Circuit):
 1. The lateral lawyer *did* have access to confidential information. (Rebuttable through a showing that she never learned anything, time records showing she never worked on the matter, &c.)

2. The lateral lawyer will share confidences with the new firm. (In the Seventh Circuit, at least, this is rebuttable with a showing of proper screening—emails saying “don’t discuss,” passwords and locks, partners’ discussions, protections against milling about and general gossip.)
- “Can We Hire Taylor Monk?” New York’s *Kassis* rule is trickier than Illinois’s. “You can screen, without informed consent required, when the lateral’s information is unlikely to be significant or material.” And we define that... how?

5.2.1 Government Lawyers

- “Investigating Landlords”: *Rule 1.11: Lawyers who leave government service have different issues. Less now, since across-the-board screening is possible under ABA rules at least, but still problematic. First, they are subject to 1.9(c) about information reveal, and second, may not represent a client in a matter in which the lawyer participated personally without agency consent.*
- *Rule 1.11(b): The firms are out too, unless the former-government lawyer is screened and written notice is given to the agency.*
- *But drafting a law is not deemed a matter under Rule 1.11.*
- So, Cynthia obviously can’t sue a landlord that she subpoenaed, but any that she didn’t are fair game.
- As to defending the landlord, she can probably do that. We exclude drafting a generic rule from the definition of “matter” in Rule 1.11.
- Danger zones are everywhere—the standard for conflicts is strict liability, at least as far as the bar is concerned.

6 Ethics in Advocacy

- Prosecutors don’t ask about the adversary system and its benefits and failures. They’re too invested.
- Trollope, Rifkind, Frankel, Post—how adversarial is it?
- “Which system is better,” adversarial or cooperative?
- Adversarial: More money, *ceteris paribus*, wins.
- Cooperative: The facts are public. You can discuss what they mean, but the facts themselves are public.

- Problems with the cooperative system: Less investigation, lawyers will want to be less informed about the client (so they have less to turn over), clients might be afraid to talk to their lawyer.
- The clients will hold back—which might make it their own fault.
- And what about snowing the other side under with documents?
- The side that thinks the facts are on its side might not investigate, because at best it'll be in the same position and at worst it'll be worse off.
- In an adversarial system, we lawyers have more to sell, and the public might get less than it would want if it was fully informed.
- *Rule 3.3: A lawyer may not knowingly make a false statement of fact or law, fail to correct same, fail to disclose controlling, directly adverse legal authority, or offer false evidence, to a tribunal.*
- Judges frequently read out the "controlling, directly adverse" part of the legal authority rule.
- Note that *lawyers are required to take reasonable remedial measures, up to, if necessary, disclosure to the tribunal.*
- *Rule 1.11(b): If a lawyer knows that a person is, has been, or will be engaging in criminal or fraudulent conduct, of any sort, he must take remedial measures.*
- *These duties continue until the end of the proceedings—the trial and all appeals. Then they're gone.* Except in New York, where a rush job of drafting left out the temporal limitation.
- *Nix v. Whiteside*: Client indicates he's about to say he saw a gun, when he didn't. Lawyer threatens to withdraw from representation if client goes through with it; client backs down, is convicted, and claims a Sixth Amendment violation.
- The threat to withdraw is not a violation: there is no Sixth Amendment right to lie on the stand.
- "Out Carousing with Mikey": What can the lawyer do? Tell the jury a new story: "OK, so it wasn't Mikey that Carlo was drinking with, but he was drinking! His memory's hazy, he can't recall who. Mikey will testify that Carlo goes out drinking a lot." Is that enough?
- There are limitations to not learning everything—you can't raise justification if you never asked "did you do it?" And savvy clients will lie to their lawyers.
- The *Anatomy of a Murder* "Lecture": did Biegler act properly?

- “Did you communicate?” Can the lawyer stay quiet? Has the client perjured?
- “The Eyewitness”: Can you argue that the jury should find, as true, facts that you know are false?
- The Subin/Mitchell debate: “monitor” versus “advocate.” Subin objects to a “false defense,” but Mitchell argues about the line. The Christmas Tree Star example is a good one.
- The defense lawyer’s hands being tied might encourage prosecutorial sloppiness—no need to make a bulletproof case. This is certainly bad.
- The Walser Issue: Defendant moves for SJ, response due on 5/5, asks for extension on 5/4 and gets response of “no, submit forthwith” on 5/10. Is 5/22 “forthwith”? Walser briefs the “immediately, without delay, prompt, and with reasonable dispatch” language in *McAllister*, but leaves out the *Dickerman* 24-hours figure it cites, leaves out the indication of emphasis, and removes the “as used in the SAA” qualifier.
- She gets sanctioned under Rule 11.
- “Maxwell’s Silver-Handled .38”: If the defense lawyer has the burden on the issue of self-defense, and can only allude because it wasn’t clear? Now, it’s not just punching holes in the prosecution’s true evidence by alluding to falsehood, it’s asking the jury to affirmatively find what we know is false.
- The Collaborative Law movement, to solve these problems, arose in divorce law. Desperately needed.

7 Prosecutors

- “Anita Winslow”: Is it legitimate to charge Anita to the max in hopes that months in jail will “soften her up”? Yeah, probably.
- Daniel Bibb: What can or should a prosecutor do?
 - He had options—resign, refuse, “throw the case”?
 - Bibb: “No such thing as a factfinding hearing.”
 - Bibb turned over everything he had, and pointed out the good stuff to them.
 - It’s commonplace for prosecutors to advocate hard for the guilt, but not on the sentencing factor.
 - Bibb insists that any withdrawal would have been quite noisy indeed.
- Does Bibb’s defense depend on whether he was right?

8 Negotiation and Transaction

- *Rule 4.1: A lawyer may not make a false statement of material fact or law to third parties, and must disclose to third parties a material fact in order to avoid assisting a fraudulent or criminal act.*
- What does a lawyer do when he learns in negotiation that a client has engaged in such conduct?
- Threshold question for Rule 4.1(b): Does the conduct actively assist the fraud? Check the substantive law.
- Under Rule 1.6(b)(2), the crime or fraud has happened. But (3), the “avoid substantial injury” issue, that might cover it.
- “Noisy Withdrawal”: *OPM* case. Lawyers for a midsize firm learned their clients were lying about collateral in bank loans. They withdrew silently from the case and got sued.
- New York changed the rules to allow not revealing what you know, but withdrawing and taking back what you said: “I can’t say why, but I take back my statements.”
- What about the client suing for breach of fiduciary duty? Could the client say that yes, it was a contract breach, but it was not fraud?
- “Bad Client’s Good Lawyer”: Maybe the plan isn’t to sue to win, but sue to get a settlement and insurance.
- “Complex Formula”: Discrepancy made by wife’s lawyer. May, or must, there be a correction?
- *Sumnerel*: The Court reformed the contract, saying it wasn’t an offer capable of acceptance.
- Could the husband’s lawyer come back and say “We agree on the number, but won’t discuss the formula”?
- From the list on p. 511, what’s false?
 - A The quintessential puffery.
 - B Same as A.
 - C Talk about what *is*, not what will, may, or could be.
 - D Same as C.
 - E Same as A.
 - F Same as C.
- *Fire Insurance Exchange v. Bell*: Said the policy limit was \$100,000, when it was thrice that.

- Bell claimed that the plaintiff and lawyer had no right to rely on the opposing lawyer’s assertion of facts.
- That got thrown out. There needs to be reliance on what lawyers say.
- *Hoyt*: A lawyer presents as true a fact that he knows is not true based on his knowledge.
 - Hoyt: “I don’t know any way to pierce the corporate veil, do you?”
Lawyer: “There isn’t any way.”
 - The lawyers claimed this was an opinion of law, not fact.
 - Court found for Hoyt, because this wasn’t pure law, as in, “this case means X.”
 - This was mixed fact and law, and imputed facts. Even if the lawyer didn’t know the facts, he pretended to, and purported to assert them.
- *Virzi*: Plaintiff died, would have been a good witness, and lawyer doesn’t tell.
 - Normally, there is no affirmative duty to tell the other side about their misapprehension. You can’t *create* the misapprehension, but you don’t have to correct one they got themselves.
 - But there is a special affirmative duty to report the death of the client to both the opposition and the court.
- *Spaulding v. Zimmerman*: Defendants find a problem related to the accident and settle right quick. Judge reopens the settlement, because it had to be court-approved.
- The cases on p. 520 (lawyers without facts, outside math error, &c.) are not necessarily consistent.
- The underlying theme seems to be not exploiting falsity.
- Mere nondisclosure to an adverse party and a court of facts does not appear to constitute fraud on the court.
- In a criminal case, though, a guilty plea where the victim has died of unrelated causes gets no dice. There is no duty to inform the defendant about the death of a nonlitigant.
- Threatening criminal prosecution to get money is a form of extortion. But threatening to report a civil harm is *not* extortion, at least not in New York.

9 Entity Representation

9.1 Who's Your Client

- Lawyers for organizations are not necessarily lawyers for the organization's controllers. But the controllers do control the lawyer.
- *Rule 1.13: The lawyer represents the organization acting through its constituents.*
- Some scenarios on p. 530:
 - Business decisions are not within the lawyer's responsibility.
 - Legal dimensions, you must at least speak up about. There is no legitimate interest in violating the law.
 - And if the constituents steal from the entity, well, the duty is to the entity, not the constituents.
- *Rule 1.13(b) creates a mandatory duty to act as "is reasonably necessary" to protect the organization's best interest. The lawyer must refer the matter all the way up to the top, if necessary—Board of Trustees/Directors.*
- That was passed to quiet the SEC.
- Sarbanes-Oxley also imposed complicated duties on lawyers.
- *Tekni-Plex*: Understand this, and you understand the issue.
 - When you sell a business, and the rights, titles, and obligations, you sell the "incidents" of the sold business's attorney-client relationship with its lawyers. Whatever those are—loyalty (1.9), confidentiality (1.9(a))—whatever was owed to the seller before the sale is completed, it's owed to the buyer. The *buyer* is the former client.
 - So is the matter in *Tekni-Plex* substantially related? Is that prong of 1.9 active?
 - Is the "former client" a former client concerning the warranty of the financials?
 - The claim is that the duties owed in a situation not adversarial to Cortina transferred to Cortina, but at the buy-sell, Cortina had no expectation it was acquiring the firm's active duties to the seller at the time it bought the property.
 - Chief Judge Kaye says there's a good reason we don't transfer to the buyer the incidents of the A-C relationship arising out of the merger itself. The seller would have no confidence of confidentiality.
 - The upshot: duties owed during the merger negotiations do not transfer. But other matters do.

- Now, what tends to happen is a market: “We’ll sell you everything but the privilege.” “OK, but we want a discount.”
- So, if you were the buyer, and you didn’t want to exclude the privilege, what would you want from the firm? The files. Everything the firm did.
- You also don’t want there claim that the constituent thought he was your client. Hence, *Upjohn* warnings (such as in *In re Grand Jury Subpoena*, but better phrased than the troublesome ones there).
- The higher-up a constituent, the less plausible the “I thought they were my lawyer!” claim.
- *Murphy & Demory*: Bench opinion. Firm sued was Pillsbury. The lawyer whose conduct contributed to the problem had *written a book on legal ethics*. And the court outlined (on p. 562) thirteen ways Pillsbury violated its duties!
 - The lawyers helped a shareholder steal business from the client.
 - And a junior associate had sent emails asking if this was OK.
 - And oddly, Pillsbury didn’t settle.
- Another problem for law firms: Let’s say you represent a corporate parent. Do you represent all the children? And who controls the privilege—such as for internal investigations?
- Early on, there was no automatic equivalence, but the ABA came up with a list of when equivalence would/should be found:
 - By express or implied agreement.
 - By receipt of confidential information (such as would result from antitrust, securities, or contracts).
 - By companies operating as alter egos (no corporate formalities—one company. Rare).
 - By integrated operations, management, and counsel—same email, same personnel, same building (different from alter egos because there are separate books and other corporate formalities).
 - Possibly, when adversity to a nonclient member would economic harm to another member (such as the parent); if you represent Parent, and someone asks you to bring an action against Subsidiary, but the action is so big that Parent would be economically harmed.
- That last one is controversial.
- Lawfirms will try to hedge with retainer agreements and waivers, but it’s unsure whether courts will buy that.

9.2 Whistleblowing and Retaliation

- “Contraindications”: The GC believes this to be a judgment call.
- *Balla v. Gambro*: Illinois Supreme Court denied a claim of retaliatory discharge because it was a lawyer. California, though, recognized one a little later.

10 Controlling the Likelihood of Professional Failure

10.1 Bar Admission

- Durational residency requirements for bar admission are gone, but residency itself is still possible.
- *Griffiths v. Connecticut*: The State cannot forbid a legal immigrant who is not a citizen from taking the bar.
- The EU has practically destroyed the distinctions between lawyers in countries (which can have different legal systems entirely!) but we have them between states.
- There are, though, waive-ins. Some.
- Stephen Glass: Is the Bar Committee giving its imprimatur to a lawyer by admitting him?
- Isn't there a claim of meeting minimum standards, including character and intelligence?
- Should we protect the public from him, or the public's trust in lawyers from his damaging it?
- *In re Mustafa*: Immediate admission was denied for the financial chicanery, but it was a “wait a year” scenario.
- And what about a racist (but First-Amendment protected) person like Matthew Hale?

10.2 Transient Lawyers and Multijurisdictional Firms

- *Leis v. Flynt*: Per curiam opinion. A prominent lawyer representing Larry Flynt couldn't get *pro hac vice* admission to the bar in Ohio.
 - The judge didn't give a justification, he just denied the admission.
 - The Supreme Court ruled that there was no constitutional property right in the expectation of *pro hac vice* admission. Nothing that the Constitution protects was taken from anybody.

- Stevens, in dissent, disagreed, saying that things the Constitution protects have been violated. Ohio routinely granted consent, and besides, lawyers crossing state borders have been instrumental in protecting Constitutional rights (which leads to the expectation of *pro hac vice* admission).
- Practically, though, *Leis* notwithstanding, admission is rampant—there might be a requirement of local counsel to assist, at best. So *Leis* is practically, if not doctrinally, dead.
- *Birbrower*: Modern UPL/crossing state lines issues. Arbitrators, negotiators, &c. don't get *pro hac vice* admission. *Birbrower* couldn't get fees for the work it had done in California, because it was a New York firm.
- *Rule 5.5(c)*: *A lawyer can travel temporarily out of a state to practice in a host state if it meets one of four safe harbors.*
- Added to undo the effect of *Birbrower*. But how far does it go?
- “Local Office, National Practice”: *Rule 5.5(c)(1) is expensive—get a local lawyer who's actively involved.*
- *Rule 5.5(c)(3) deals with ADR that is born out of a lawyer's home jurisdiction.* That doesn't apply.
- *Rule 5.5(c)(4) handles “reasonably related to a lawyer's practice in a jurisdiction the lawyer is licensed to practice in.”* But what if she doesn't have any clients in her home state? And what if so much of your work is in a place that it's not really “temporary” any more?
- The contradiction: As long as you're licensed to practice where you're sitting, you can discuss the law of any place.
- What about the phone or email? Where are you when you do that?
- Jill could get a choice-of-law clause, to undo the “point of conection” issue; but the state law she wants to be authorized might not be best as far as the interests of client or employer.
- This is arguably irrational, but are there justifications?
- Local rules and law are different. Even contracts get judged by local laws.
- There is no authority to control an out-of-state lawyer.
- What about confidence that the lawyer will be familiar with the localities? Well, most law schools don't train in local law anyway.
- Many states have a version of *Rule 8.5*, which is a “long-arm statute” for disciplinary proceedings.

10.3 Unauthorized Practice of Law

- *Professional Adjusters v. Tandon*: The adjusters might know the law of insurance better than the lawyers, and they're licensed, too. But the judge says "they were practicing law and they can't do that."
- Who negotiates for the insurance company, though? Adjusters.
- The adjusters lost this one because lawyers' economic base was threatened, really.

11 Remedies for Professional Failure

11.1 Malpractice

- "When Sally Left Harry": The "what about property gained during the marriage" factor was an open question, but in the intervening years, the supreme court and then the legislature fixed things.
- Is there a claim against the lawyer? If he'd brought up the possibility, it could have been settlement liability.
- And Sally probably had a right to know about the factors.
- The underlying could be that he violated his duty to give her information she needed.
- Not to mention, he arguably had an interest in not challenging the exact case he won on. Of course, that's a factual inquiry.
- If a lawfirm is a traditional partnership, every partner is liable—hence, most are LLPs, where you can't go after other partners' personal assets.
- But what about the *Togstad* factor, of what you say when you say you're not interested?
 - Miller said, for reasons we don't know, "you don't have a case," and didn't mention the statute of limitations. It ran out. But "we're not interested" wouldn't have had a problem.
 - So, say "we are not interested, not based on the merits."
- One issue: it's hard to prove malpractice, because you have to show that you would have won against the original defendant. The lawyer is in the original defendant's shoes.
- Time goes by, this is hard to prove, and you can't show that a settlement would have occurred.
- *Smith* and *Hendry* were a boon to plaintiffs' lawyers.

- The Scope of the Rules says that a violation was not a basis for civil liability. But at the same time, a violation of the rules can be evidence of a breach of the standard of care.
- *Smith* allowed an expert to testify about the conflict rules, and to testify that in his opinion the firm was conflicted.
- *Hendry* said that since disloyal agents forfeit a fee, and lawyers are agents, *there is no need to show damage, just the breach.*
- *Adkins v. Dixon*: Criminal defense lawyer screws up, and defendant is convicted and it's affirmed. How do we recognize this claim?
- Normally, the solution isn't to make the lawyer pay for the time in prison: the Texas case is an outlier.
- The dissenting chief judge in *Peeler* points out that if the lawyer had done his job, Pelere would have never been convicted. Legally, she is innocent. (But that's a dissent.)
- *Viner v. Sweet*: Lawyer screwed up by the numbers.
 - Two possible liability arguments: "Show but-for cause" versus "show substantial cause."
 - The liability prong can be proven by another attorney as an expert, and/or proving that there wouldn't have been a better deal, but *no deal.*
 - You're more likely to win on substantial cause, but if you win on but-for, you won't get screwed by the appellate court if they decide but-for is the standard.
 - Could you ask for a special verdict? Maybe.
 - What about the court giving the Viners a chance to make their case under the higher standard?
- "Memorandum from the Chief Judge": Damages issues. Is the lawyer on the hook for punitive damages he didn't tell the client about or fight for? What about punitive damages he didn't get reduced?
- No cases have found any distinction between those fact patterns...and they usually don't hold the lawyer liable.
- What about contingency fees? If you would have gotten \$3m, but you'd have given the lawyer (whom you're suing) a third, do you get \$2m from him? What about paying the new lawyer the same third?
- New York gives no credit. Other courts disagree.
- Generally, when you have to hire a lawyer to sue another lawyer, you can't get attorney's fees for the new lawyer. Except in New Jersey, or when you're suing the lawyer both for damages and to undo another screwup.

11.2 Women in the Law: Deborah Rhode

- Why didn't Wolf Block settle? Pride? The hit to their reputation if they did? Wanting a reputation for not being easy to extort? Already been hit and what do they have to lose?
- But they could have settled—who are their audiences? Clients, future associates?
- Who won that suit? Ezold seemed satisfied, Wolf Block vindicated—at least some partners.
- Future Wolf Block female associates made partner, as “Ezold partners.”
- And then we have allegedly cruel statements like at SullCrom.
- And finally, what about staffing issues? Associate gets yanked off of a case because he or she will not be good long-term for the case (race, ethnicity, sex)? Would it be better to have different initial staffing?

11.3 Liability to Third Parties

- There was a time that this idea was insane. But 50 years ago, that changed.
- California: “Privity is not a complete defense. Sometimes, the common law will justify holding lawyers liable to third parties for their conduct, even if it falls short of intentional wrongdoing.
- New York was among the last state to follow CA's example.
- *Petrillo* is the extreme edge: claiming that Herrigal created an opportunity for confusion by giving Bachenberg only two sheets with a misleading 2 of 7 passes, instead of 2 of 30; a disclaimer would have solved that.
- Negligent misrepresentation—making a negligent statement which the listener had a right to rely on—is the most common case.
- Herrigal “controlled the risk that the composite report would mislead the purchaser.” He was in the picture continuously, and could have spoken up at any point.
- *Slotkin*: You don't have to have bad faith, either. (This was in the privity era, so the judge said it was an issue of facts, but nowadays it would be negligent misrepresentation.)
- “My Client Tells Me”: The magic words.
- Law firms are also ultra-rational actors—they might likely settle if they don't get SJ, because they don't want the publicity.

- “Death, Taxes, and Liability?”: “We calculated all estate taxes.”
- Insurance company sues when they’re wrong. Claim: “We spoke as best we could.” No dice.
- What would be better? Telling the client to send the returns, or saying “we advised our client to pay all taxes he was aware of,” maybe.

12 Lay Participation

- This is structural—deals with how the business of legal advice is bought and sold.
- The last third of the 20th century saw six big changes to this structure:
 1. The USSC forbade a state from denying an out-of-state resident from taking the state bar. (Constitutional right to take the NH bar.) Similarly, rules granting residents but not nonresidents motion admission. (And duration requirements, which were scrapped in the early ’70s.)
 2. Federal preemption of state bar authority—the states cannot bar someone who is federally authorized to give legal advice from doing so. (There could be a national bar! There won’t though.)
 3. A state cannot stop a person from giving legal advice via publication.
 4. UPL issues, such as Quicken Family Lawyer; likewise, minimum fee schedules getting struck down as price-fixing.
 5. Striking down of anti-advertising and anti-solicitation rules (except some circumstances like the 30-day cooling-off period); representative of the change of reasoning as lawsuits as a necessary evil to sometimes just necessary.
 6. And the children of *Button*.

12.1 Non-Profit

- *NAACP v. Button* is fundamental to the public interest nonprofit law firm. It and the three union cases that followed.
 - Virginia threw up roadblocks to the enforcement of the desegregation-of-schools right. It made it harder for people to bring claims.
 - They were watered down to very little (no intermediaries to go out and find plaintiffs) when it got to the USSC, but the USSC’s ruling was broader.
 - The *Button* opinion is not clear, but the holding is.
 - “When it comes to using courts for the vindication of constitutional rights, the First Amendment protects organizations like the NAACP and allows them to employ lawyers, despite not being a law firm, and to recruit through solicitation. The First Amendment is a shield.”

- The State’s argument that it was worried about the corruptive influence of non-lawyers was overruled.
- Harlan, in dissent, said that if the states are allowed to be concerned about economic motives, why not political ones? Since worse has been done for politics than for economics.
- The anti-solicitation rules and prohibitions against lay participation, though fully constitutionally defensible in for-profit law firms, do not apply to public interest firms.
- Many years later, Edna Smith (later Primus) violated the South Carolina anti-solicitation rule while working for the ACLU, and won on these grounds, even though she wasn’t a staff lawyer.
- The line between for-profit and not-for-profit is not clear. If a firm is only a fee-shifting/contingency firm, it might consider itself not-for-profit.
- Cooperating lawyers work with public interest firms on a fee-shifting basis, and the Courts and ABA agree that that still can justify a not-for-profit basis.
- The union cases: the bar associations showed their true colors.
- Deals with private firms: referral in exchange for limited percentage fees. In one case, they hired a lawyer on salary.
- Justice Black wrote three times to strike down challenges to those.
- “The state bar thinks they have a right to charge exorbitant fees and prevent unions from identifying competent lawyers.” He got more sarcastic.
- The claim that this wasn’t constitutional rights? No matter—it was still petitioning the court.
- It wasn’t federal, but state? No matter—still petitioning the court.
- “The common thread... is that collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment.”

12.2 For-Profit

- For-profit is different. Only in DC can nonlawyers be equity partners in law firms. As long as the firm is purely a law firm, and the lawyers aren’t directed by nonlawyers.
- There is an interest in having lobbyists or economists in DC firms, and they want to be partners. Professional pride.
- No sharing legal fees with nonlawyers outside of DC, though, for multi-location firms.

- Litigation-funding companies are getting into trouble for “champerty,” the French doctrine that investing in lawsuits “stirs up litigation,” which is a necessary evil.
- But these litigation companies aren’t encouraging the suits, just passively investing.
- *Rancman*, OH supreme court, didn’t consider the policy. If you have two years left in a suit, and you only have one asset—the suit itself—where can you sell a piece? Not to your lawyer—a lawyer even lending car fare, or medical expenses, or rent money, or even \$100 is a problem—and not to the outsiders.
- We created a single-buyer market, and that buyer—the defendant—won’t buy piecemeal!
- Of course, you can get a loan, but that’s economically tricky.