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§ 1. The Relationship of Law, the Lawyer, and Ethics

I. Adversary Ethics
   A. Failure to Disclose Evidence to Other Party –
      (1) Spaulding v. Zimmerman [p 5–9]
         a. Facts: Tort case involving injury to minor, π. The doctors for the Δ figured determined that the minor π had an aorta aneurysm which may have been the result of the accident. The Δ’s lawyers did not disclose this to the π’s lawyers, and the court approved the parties’ settlement.
         b. Held: While no canon of ethics or legal obligation may have required them to inform π or his counsel or advise the court, it became obvious to them at the time, that the settlement then made did not contemplate the disability. This fact opened the way for the court to later exercise its discretion in vacating the settlement and under the circumstances, it was not an abuse of discretion.
         c. Note: Spaulding turns on the special responsibilities of a court toward a minor. If Spaulding was an adult, the court would have left Spaulding to seek redress against his doctor and his lawyer.
         d. Rule – Absent special circumstances, such as mutual mistake, fraud on the court or concealment from the court, courts will not set aside a judgment because a lawyer has concealed adverse evidence from the opposing party.
            (2) But see Virzi v. Grand Trunk – Court set aside a $35,000 settlement in a PI case because the π’s lawyer had concealed the fact that the π had died of causes unrelated to the suit.
               a. Note – The specific holding of Virzi rests on concealment from the court, not failure to disclose.
   B. Disclosure of Adverse Evidence
      (1) Fed.Rule Civ.Proc. 35 – Splading’s lawyers could have obtained a copy of the defense expert’s report if they asked the right questions or made the right motions.

II. Introduction to Ethical Codes
   A. Canons of Professional Ethics
      (1) ABA 1908 – Canons remained in force in the states until the early 1970s.
   B. Model Code of Professional Responsibility
      (1) ABA 1969 – Much more complicated than the 1909 Canons.
      (2) Problems – Structural and the MC was criticized for embodying outdated assumptions about what lawyers do and their practice.
   C. Model Rules of Professional Conduct (MRPC)
      (1) 1983 – ABA House of Delegates adopted the MRPC, with the recommendation to states and to federal courts and agencies that the Model Rules replace the Model Code.
      (2) By 1991 → 41 states & D.C. Adopted MRPC – Some states, e.g. NY, NC, and OR, have decided to retain their versions of the MC with numerous adjustments based on provisions in the MRPC.
   D. Ethics 2000 Comm’n – In 1998, the ABA launched a broad review of the MRPC—“Ethics 2000.” It remains unclear what the outcome will be.
   E. Ethics in Federal Courts
      (1) No special set of ethics rules –
(2) Federal Rules of Attorney Conduct—Adopt an *Erie* approach in that the basic standard of Rule 1 is to apply the ethics code of the state in which the Dist. Ct. sits as *default standards* for federal court proceedings.
a. **9 Other rules**—Provide uniform nation rule for certain matters thought to be of special significance to the integrity of the federal courts or reflect special federal policies.

F. **Other Sources of Ethical Guidance**
   (1) **Restatement**—In ’98, the ALI approved the final draft of the Rest. (3d) of Law Governing Lawyers.
   (2) **ABA Standards Relating to the Admin. of Crim. J.**
      a. Don’t have the same force as the MRPC or Model Code, but are frequently relied on by prosecutors/defense counsel.
   (3) **Model Code of Judicial Conduct**—Originally adopted in ’72, applies to judges and has been adopted in most states and the federal courts.
      a. Imposes controls on relationships between judges and lawyers.
   (4) **Ethics opinions**
      a. Don’t have the force of law, but they are sometimes cited by the courts.
      b. **Formal v. Informal**
         (i) **Formal opinion**— Responds to a question of general interest.
         (ii) **Informal opinion**—A response to a question narrow in scope.

III. **REFLECTIONS ON SPAULDING**
   A. What Really Happened

IV. **PERSPECTIVES ON MORALITY OF THE LAWYER’S ROLE**
   A. **Lawyer as Friend?**
   B. **Lawyer’s Partisan and Amoral Role**
      (1) **WASSERSTROM** [p 21–28]
   C. **Perspective of the Bad Man**
   D. **Relational Feminism**
      (1) **GILLIGAN, IN A DIFFERENT VOICE** [p 36–38]

V. **PITFALLS FOR THE UNWARY**
   A. **Sharing and Using Law and Facts**
      (1) **In re Krueger**—The Client, while living in IL, hired Krueger, a WI lawyer to represent him in a divorce proceeding. Krueger counseled the client to rent a room in WI to satisfy the residency req’t for divorce there. Client did so for two weeks, and Krueger filed the client’s divorce petition alleging that the client had been a resident for more than 6 months and out of the county in question for more than 30 days.
      a. **Held**—Krueger publicly reprimanded for unprofessional conduct, because although he didn’t tell his client to testify falsely, he did tell the client how to “manifest an intention to continue his Wisconsin residency, despite the presence of facts indicating a specific intention to abandon a Wisc. domicile.”

   B. **Are Lawyers Immune from Law’s Prohibitions?**
      (1) **Commonwealth v. Stenhach** [p 41–50]—Public defenders appointed to represented a man charged with murder followed their client’s directions and recovered a rifle stock used in the homicide. Allegedly believing that disclosure of the rifle stock would be legally and ethically prohibited, the PDs did not deliver it to the prosecutor until ordered to do so by the court during the prosecution’s case. After the client was convicted, the lawyers were charged with hindering prosecution, tampering with evidence, criminal conspiracy, and criminal solicitation.
a. Held – The statutes under which the PDs were convicted were unconstitutionally overbroad as applied to criminal defense attorneys ∴ they were dismissed.

b. Rule: Duty to turn over evidence – A criminal defense attorney in possession of physical evidence incriminating his client may, after a reasonable time for examination, return it to its source if he can do so without hindering the apprehension, prosecution, conviction or punishment of another w/o altering, destroying, or concealing it or impairing its verity ... in any pending or imminent investigation/proceeding. Otherwise, he must deliver it to the prosecution on his own motion.

(i) In this case, the prosecution is entitled to use the evidence as well as info. pertaining to its condition, location and discovery, but may not disclose to a fact-finder the source of the evidence.

c. Did the Lawyers in Stenhach commit a crime?

C. Lawyers and Incriminating Evidence

(1) Ethics Rules and Criminal Statutes

a. MRPC 3.4(a)

(i) “A lawyer shall not unlawfully obstruct another party’s access to evidence, or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act.”

(ii) See also Rules 1.2(d) and 8.4(b)

☞ MRPC 1.2(d) – “A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows in criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.”

☞ MRPC 8.4(b) – “It is professional misconduct for a lawyer to: ... (b) commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects”

(2) Case Law on a Lawyer’s Obligations as to Incriminating Evidence

a. General Rule – Following Stenhach, a lawyer must deliver physical evidence when those laws would be violated by retaining the evidence.

b. 2 Limits

(i) Evidence created as part of a defense – Protected by attorney-client privilege

(ii) Evidence state can’t compel – That which the state can’t compel against the Δ’s will mustn’t be turned over.

c. 3d Person providing evidence – When the source is a third person, the courts hold that the evidentiary privilege does not apply (Olwell).

(3) The Dead Bodies Case – Garrow

a. Facts: Murder Δ confessed to his lawyers, Belge and Armani, that he committed the crime charged and two others. Police hadn’t found bodies of other two. Following Δ’s instructions, lawyers found the bodies and photographed them, but told nobody of their discovery. At a press conference after the Δ was convicted, the lawyers acknowledged they knew the location of the two v’s bodies but had remained silent. Criminal charges were filed against Belge for violating a NY law requiring a decent
burial for the dead and reporting of any death that occurs w/o medical attention.

b. Held: Trial court dismissed case based on attorney-client privilege, but noted that “an attorney must protect his client’s interests [and] observe basic human standards of decency, having due regard to the need that the legal system accord justice to the interests of society and its individual members.”

(4) Why Lawyers are not Prosecuted for Concealing Evidence – 3 Primary Reasons
a. Most of the evidence statutes require proof of “specific” or “willful” intent, and prosecutors appreciate that defense lawyers will claim to have concealed with intent only to fulfill their professional responsibilities;

b. Prosecutors tend to exercise their discretion against bringing such charges in the absence of malice or bad faith;

c. Prosecutors may share in the assumption that lawyers are somehow immune from liability.

(5) Stenhach II — Office of Disciplinary Counsel v. Stenhach
a. Holding – PA disciplinary board unanimously refused to discipline the Stenhach bros for their conduct and found that they had “resolved in favor of their clients doubts as to the bounds of law,” and acted in good faith and were guilty only of “zealous advocacy.”

(6) Should Nixon have Burned the Tapes?
(7) Document Retention and Destruction –

a. General rule – Business records are usually not protected by the attorney-client privilege and thus can be discovered by appropriate legal process or seized by the exercise of a valid search warrant.

§ 2. Conformity to the Law

I. Criminal Law

A. Fraud and Criminal Complicity

(1) U.S. v. Benjamin – (CA2 ’64) –

a. Facts – Securities fraud case in which a promoter used a lawyer (Benjamin) and an accountant to perpetrate the fraud. All three were convicted of conspiring to sell unregistered securities and to defraud in the sale of securities. Essentially, the three raised capital by using a shell company that in reality had no assets. To get an investor to buy the securities, Benjamin provided him a legal opinion that “the aforesaid shares are presently free and tradable” pursuant to § 3(a)(1) of the ’33 Act. The accountant, invited by Benjamin, used a yellow handwritten sheet of paper listing certain real estate holdings in Detroit and balance sheets of corporations which the promoter and Benjamin claimed were “owned or controlled” by the shell co. to prepare a paper attesting to the veracity of the company’s holdings and further perpetrating the fraud.

b. Held – Congress did not mean that any mistake of law or misstatement of fact should subject an attorney or an accountant to criminal liability ... but [it] equally could not have intended that men holding themselves out as such professionals should be able to escape criminal liability on a plea of ignorance when they have shut their eyes to what was plainly to be seen or have represented a knowledge they knew they did not possess.

(2) Proof of Criminal Liability

a. What a Lawyer “Knows” — Mens Rea
(i) **MRPC 1.2(d)** – “A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows in criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.”

(ii) **Heightened Standard** - *Benjamin* reflects the belief that lawyers and accountants have a greater responsibility to know their client’s actions and goals than nonprofessionals in similar situations.

b. **What a Lawyer Does — Actus Reus**

(i) **Giving advice** – An act routine in law practice, e.g. giving advice, may constitute the requisite actus reus, resulting in criminal liability if combined with the required culpable mens rea.

☞ *U.S. v. Feaster* – Court upheld the charge of aiding preparation of a false tax return in a case in which a lawyer advised an undercover agent, posing as a client, on how to avoid paying taxes.

(3) **Prepaid Legal Services for Those Engaged in Crime**

a. **Cannot do this** – *In re Disbarment Proceedings* (Pa 1936) – An attorney who agrees in advance to defend persons if and when arrested for criminal offenses for future comm’n is a planned certainty, or from whose conduct such an agreement may be inferred, forfeits all right to practice law.

B. **Other Crimes**

(1) **Obstruction of Justice**

a. **18 USC § 1503** – Whoever corruptly endeavors to influence, intimidate, or impede any officer of any court of the United States in the discharge of his duty or corruptly influences, obstructs or impedes or endeavors to influence obstruct or impede the due administration of justice shall be fined or imprisoned or both.

b. **U.S. v. Cintolo** – A lawyer was convicted of obstruction even though giving advice is not, of itself, unlawful. The lawyer advised his client to refuse to testify before the grand jury even though the client had a valid grant of immunity. The evidence showed the lawyer was trying to keep the grand jury from finding out about the criminal activities of others, some of whom the lawyer-Δ represented.

(2) **Mail Fraud**

a. **Statutes** reach fraudulent schemes to deprive people of intangible civic rights in addition to money or goods.

b. **Carpenter v. U.S.** – A WSJ columnist was charged with giving two securities brokers advance notice of his column. The brokers and their clients bought and sold securities based on the probable impact of the column on the market. The lower court convicted the columnist and his co-Δs for violating the federal securities laws and the mail/wire fraud statutes. The S.Ct. **unanimously** affirmed the fraud convictions.

c. **Rule** – A lawyer who appropriates information of the law firm or the client and uses it for personal gain, in violation of this relationship of trust and confidence, is guilty of mail fraud.

(3) **Conspiracy**

a. **Defined** – An agreement to do something unlawful → intentional tort, usually referred to as “acting in concert.”

b. **Lawyers’ exposure** – Lawyer held to violate civil conspiracy law when:
(i) Lawyer prepared materially misleading documents to secure a bank loan for a partnership in which the lawyer was a member;  
(ii) Knew that the misleading information was being used to secure new loans; and  
(iii) Benefited from the money fraudulently obtained, which was used to pay a debt of the partnership.  

(4) **RICO**  
a. **U.S. v. Teitler** – CA2 aff’d the conviction of two lawyers for engaging in mail fraud, conspiring to conduct the affairs of an enterprise through a pattern of racketeering and conducting the affairs of an enterprise through racketeering. The enterprise was the law firm.  
   (i) “The method of operation employed by the enterprise included the creation of false documents and the encouragement of perjury by the firm’s clients in order to inflate their injuries and expenses so as to obtain better settlements in negligence lawsuits brought by the firm.”

C. **Paying Lawyers with Proceeds of Crime**  
(1) **Rule** – If a lawyer knows that the amounts paid to her are the proceeds of ongoing criminal activity, the lawyer’s action in accepting the payment is illegal because the money is either contraband or stolen property.  
(2) **Primary issue – Confidentiality:** Is the lawyer req’d to divulge information concerning fee arrangements and client identity?

II. **Tort Law**  
A. **Negligent Misrepresentation**  
   (1) **Greycas v. Proud** (CA7 ‘87)  
a. **Facts** – The brother-in-law of Proud (Δ), a lawyer, brother-in-law who was a farmer in down-state Illinois, had pledged most of his farm machinery to lenders but needed more money. He approached Greycas (π) a large financial co. in AZ seeking a large loan. He did not tell Greycas about his financial difficulties or that he pledged the machinery to other lenders, but he did make clear that he needed the loan in a hurry. Greycas agreed to loan for $1.3MM on the condition that he submit a letter from counsel whom he would retain assuring Greycas there were no prior liens on the collateral. Proud, the Δ, provided an opinion letter stating he had “conducted a U.C.C., tax, and judgment search with respect to [Crawford’s farm]” and noted that that property was “free and clear of all liens or encumbrances.” When the bro-in-law went bust, Greycas sued for negligent misrepresentation (not fraud).  
   b. **Held** – Proud was liable for negligent misrepresentation as one who, in the course of their business or profession, supplied info. for the guidance of others in their business transactions.  
   (i) **Contributory negligence** – Greycas was not careless for failing to conduct its own UCC search, since the law normally does not require duplicative precautions, unless one is likely to fail or the consequences of failure are catastrophic.  
   (ii) **Disclosure of relationship** - Had Proud disclosed that he was Crawford’s brother-in-law this might have been a warning signal that Greycas could ignore only at its peril.

(2) **Liability to Non-Clients**  
a.  
(3) **Negligent Misrepresentation Cases**
a. **Greyhound Leasing v. NW Bank of Jamestown** (CA8 '88) – A lender required a lawyer’s opinion stating that farm equipment securing a proposed loan was unencumbered. Greyhound wanted a lawyer from the farmer’s locality to write the letter. Farmer told lawyer that all the equipment was new. Greyhound, although it knew that some of the equipment was used, sent the lawyers documents asserting the equipment was new, making the txn eligible for federal credits. The lawyer wrote a letter stating he wasn’t “aware of any liens or encumbrances” — which was a misrepresentation. When the farmer went bankrupt, Greyhound sued the lawyer.

(i) **Held** – For the lawyer. The ct. held that Greyhound was barred under ND’s *doctrine of comparative negligence* because its negligence exceeded the lawyer’s.

- Knew the equipment wasn’t new;
- Greyhound failed to perform an independent investigation.

b. **Roberts v. Ball, Hunt et al.** – (Cal '76) – A firm’s client needed a loan and asked the firm to prepare an opinion letter. The firm prepared the letter identifying itself as a “general partnership,” when in reality they were only limited partners. When the loan defaulted, the creditor sued and said that the firm had a duty to disclose this.

(i) **Held** – Complaint failed to state a cause of action for fraud because there was no *allegation of intent to deceive*, but held the firm might be liable for negligent misrepresentation.

- Cal. rejects privity rule. The court stated that California rejects the traditional view that an attorney may not be held liable to third parties for negligence because he is not in privity with them.

(4) **Relaxation of Privity Requirement** –

a. **General rule** – Typically a lawyer is liable for negligence only to those in privity-of-contract with the lawyer (e.g. clients).

(i) Although privity has been abolished in negligence cases involving physical harm, it retains some but diminishing vigor in negligence suits claiming purely economic harm, such as legal malpractice or a negligent malpractice claim brought against a lawyer by non-client.

b. **3 Exceptions involving Privity** – Rest. (2d) Torts § 73

(i) **Inviting reliance of non-clients** – Where the lawyer, the client invites a non-client to rely on the lawyer’s opinion or provision of other legal services.

- See, e.g., Greycas.

(ii) **Non-client enforcing duties to client** – The lawyer knows a client intends as one of the primary objectives of the representation that the lawyer’s services benefit the non-client.

(iii) **Breach of fiduciary duty owed by a client-fiduciary to a beneficiary** – The lawyer’s client is a trustee, guardian, executor or other fiduciary acting primarily to perform similar functions for the non-client and circumstances known to the lawyer make it clear that appropriate action by the lawyer is necessary to prevent or rectify the breach owned by the client to the non-client where

- The breach is a crime or fraud; or
- The lawyer has assisted or is assisting the breach.

**B. Intentional Torts**
(1) **General rule** – A lawyer has no privilege to commit intentional torts against 3d parties in the course of representing a client or to assist a client in committing intentional torts against 3d parties.

a. **Notable Exception** – Absolute privilege to make defamatory statements orally, in writing, or in court or which are reasonably related to a pending or contemplated litigation.

(2) **Proving Intentional Torts of Fraud & Misrepresentation**

a. **Elements** –
   
   (i) $\pi$ must show that a lawyer **intended to deceive** and
   
   $\Leftrightarrow$ May be shown by reckless disregard for truth.

   (ii) $\pi$ belonged to a class of people that the lawyer might reasonably have foreseen being deceived.

b. **No duty or relationship necessary**

(3) **No reason to know** – If a lawyer does not know or has no reason to know that her client is using her advice to engage in intentionally tortious activity → no liability.

a. **Worldwide Marine Trading Corp v. Marine Transp.** – A lawyer’s activities did not amount to culpable participation of the antitrust laws unless the lawyer was a “stakeholder” in the alleged conspiracy, and the lawyer must have done more than be present at the scheme, and must have done more than merely advise.

C. **Assisting a Client in Tortious or Illegal Conduct**

(1) G. HAZARD “HOW FAR MAY A LAWYER GO IN ASSISTING A CLIENT IN UNLAWFUL CONDUCT?”

(2) **3 Prong Test**:

a. The client is **engaged in** a course of conduct that violates the criminal law or as an intentional violation of a civil obligation, other than failure to perform a contract or failure to sustain a good faith claim to property;

b. The lawyer has knowledge of the facts sufficient to reasonably discern that the client’s course of conduct is such a violation; **and**

c. The lawyer **facilitates** the client’s course of conduct either by giving advice that encourages the client to pursue the conduct or indicates how to reduce the risk of detection, or by performing an act substantially furthers the course of conduct.

(3) **When Does a Lawyer Cross the Line into Illegality?**

III. **Securities and Regulatory Law**

A. **Lawyer’s Opinion Function**

(1) **FULD, LAWYERS’ STANDARDS**

a. Lawyers should be reluctant to request or provide opinions that purport to certify matters on which no lawyer can feel fully confident, such as an opinion that a corporate client is complying with all applicable

(2) **Third-Party Legal Opinions** – Increasing concern over civil liability for 3d party legal opinions has prompted bar assns across the US to draft opinion guidelines and standards.

(3) **Opinion Letters and MRPC 2.3**

a. **MRPC 2.3** – Provides that a lawyer may undertake an evaluation as long as:

   (i) It is **reasonable** to believe that making the evaluation is compatible with the lawyer’s other duties to the client; **and**

   (ii) The **client consents** after consultation.

b. **Confidentiality of Info. learned** –
2.3(b) – “Except as disclosure is required in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.”

(ii) MRPC 2.3, Comment [5]: Access to and Disclosure of Information

The quality of an evaluation depends on the freedom and extent of the investigation upon which it is based. Ordinarily a lawyer should have whatever latitude of investigation seems necessary as a matter of professional judgment. Under some circumstances, however, the terms of the evaluation may be limited. For example, certain issues or sources may be categorically excluded, or the scope of search may be limited by time constraints or the noncooperation of persons having relevant information. Any such limitations which are material to the evaluation should be described in the report. If after a lawyer has commenced an evaluation, the client refuses to comply with the terms upon which it was understood the evaluation was to have been made, the lawyer’s obligations are determined by law, having reference to the terms of the client’s agreement and the surrounding circumstances.

See also MRPC 4.1 – Truthfulness in Statements to Others

(i) “In the course of representing a client a lawyer shall not knowingly:

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

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.”

(ii) “Knowingly” – “Knowingly,” “known,” or “knows” denotes actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.

B. Aiding and Abetting a Securities Law Violation

(1) SEC v National Student Marketing Corp. [p 104–116]

a. Facts: The lawyers in this case got into trouble because the π’s conceived a theory involving facilitation of a client’s fraud through silent collaboration. The National Student Marketing Co. was involved in a stock-for-stock deal. NSM represented by White & Case, Mr. Epley, which took over the securities work after Covington & Burling withdrew. As they were getting ready to do the closing, the Accounting Firm gave an opinion that the financial statements which were given on which the Interstate shareholders relied, were wrong and misleading—instead of a profit, there was a loss during the period covered by interim financials. Beyond the interim to the fiscal year-end, they agreed would not make money. One of the Chicago lawyers who represented Interstate (Myers of Lord Bissell & Brook), were shareholders of Interstate ∴ the lawyer at the closing had a personal incentive to resolve any doubts affecting the closing. This, of course, is a conflict of interest—certainly one which might cause its partner (Shower) to have some pause in the depth with which he would rely on Myers’ conclusions.

b. Held: National Student Marketing holds that lawyers face aiding and abetting under state laws and statutes and under federal securities damages cases (for primary liability).

(i) This is not a civil damages action, but rather an SEC enforcement action.
(2) **MRPC 1.13(b) –**

a. If a lawyer for an organization knows that an ... employee or other person associated with the organization is engaged in action ... that is a violation of a legal obligation to the organization, or a violation of law [imputable] to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer’s representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

(i) (1) asking reconsideration of the matter;

(ii) (2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and

(iii) (3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

b. National Student Marketing: A Legal Ethics Landmark

(3) **Primary Responsibility – Liability of Lawyers as Principals**

a. **Active Role** – Lawyers who take an active role as entrepreneur investors, directors, officers or signatories of prospectuses may be liable as principals under the securities laws provisions imposing liability without proof of wrongful intent. See Benjamin.

b. **Mere advisors** – Lawyers and accountants who merely advise an offeror → generally not subject to liability as principals under ‘33 Act. § 12(1).

(4) **Secondary Liability – For Aiding and Abetting a Securities Violation**

a. **SEC Authority** – Under PSLRA of 1995, § 15, the SEC has authority to bring civil enforcement actions against abiders and abettors, including lawyers/accountants.

b. **Direct or Indirect** – Liability of principals under the Act extends to those who “directly or indirectly” engage in proscribed activity.

c. **Limited Liability under SLUSA** – By providing a uniform national standard for most securities fraud class action, the 1998 SLUSA drastically reduces lawyers’ exposure to liability under state law for securities or common law fraud.

C. **Culpable Intent**

(1) **Barker v. Henderson, Franklin, et al. (CA7 ’86) (Easterbrook, J.)**

a. “A plaintiff’s case against an aider, abettor, or conspirator may not rest on a bare inference that the Δ “must have had” knowledge of the facts. The plaintiff must support the inference with some reason to conclude that the Δ has thrown in his lot with the primary violators. Law firms and accountants may act or remain silent for good reasons as well as bad ones, and allowing scienter or conspiracy to defraud to be inferred from the silence of a professional firm may expand the scope of liability far beyond that authorized.”

(2) **Is Silence or Inaction a Safe Course?**
a. Facilitation w/ opinion – National Student Marketing and subsequent decisions hold that a lawyer must take some preventative action when the lawyer issues legal opinions and facilitates a sale of securities knowing that the client has made knowingly false representations in the selling materials.

b. Unsettled – When lawyer doesn’t issue an opinion but helps a client close a txn knowing that the client made false representations to those with whom the client is dealing.

§ 3. Competence - Malpractice

I. Overview of the Tort of Malpractice

A. Elements

(1) Duty –
   a. Duty of care arising from an atty-client relationship, or
   b. In those jurisdictions that have created exceptions to privity, some other showing that there was a duty to the π
      (i) Was the purpose of the atty-client relationship to benefit the π?

(2) Breach of duty
   a. Failure by the lawyer to exercise the care that reasonably competent lawyers exercise under similar circumstances. Formula:
      (i) Knowledge
      (ii) Skill
      (iii) Prudence
      (iv) Diligence
   b. Expert testimony – Usually the π must obtain the testimony of expert lawyers concerning the std. applicable in the particular situation.

(3) Causation – Cause-in-fact and proximate cause must be show.

(4) Harm – Legally cognizable harm must have been caused by the lawyer’s act or omission.
   a. Economic harm – Usually legal malpractice seeks recovery for purely economic harm

B. Lucas v. Hamm – Cal ‘68

(1) California Supreme Court affirmed a legal malpractice claim against a lawyer who screwed a will because he didn’t understand the rule against perpetuities. The court held that due to the fact that the law on perpetuities and restraints is so complex and fraught with so much “confusion,” any error by the lawyer in preparing an instrument violating the rule would be excusable because “it would not be proper to hold that defendant failed to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly exercise.”

C. Malpractice Liability to Non-Clients

(1) Beneficiaries of a Will – A number of state courts follow Lucas and allow a claim for malpractice by the intended beneficiaries of a will.
   a. Lorraine v. Grover, Ciment et al. – Fl. S.Ct. aff’d the traditional rule that privity is req’d but recognized an exception for beneficiaries of a while to whom lawyers have a “direct duty.”

(2) Adoption
   a. Metzker v. Slocum – A couple hired a lawyer to carry out an adoption, but the adoption was never perfected as a result of the lawyer’s negligence. The parents subsequently divorced, and the minor child was left without support. The child sued the lawyer for negligence.
(i) **Held:** The lawyer was **not liable** to the child, a third-party to the original txn. Even applying liberal Cal. balancing-of-factors test for 3rd party liability → no liability because the relationship between the negligence and the harm was **too tenuous** and the foreseeability of the harm to the child was **minimal**.

### II. CAUSATION AND STANDARD OF CARE

#### A. Smith v. Lewis (Cal. '75)

(1) **Facts:** Mrs. Smith hired Jerome Lewis to represent her in her divorce. Like most cases, the matter was settled short of trial. Her husband, a military man, had retirement benefits from the federal government which the lawyer (Lewis) assumed weren’t part of the marital estate for purposes of settlement. When, on his advice, Mrs. Smith entered into a settlement agreement, the package didn’t reflect the value of the husband’s military benefits. The law, which was somewhat unsettled, later settled holding the benefits were includable. If Lewis knew this, Mrs. Smith would have gotten more money. Since the settlement couldn’t be set aside, Mrs. Smith sued her lawyer: you pay!

(2) **Held:** Although an attorney in litigation can choose to argue or not argue certain issues and pick from alternate legal strategies, there is nothing strategic or tactical about ignorance. In the case before us, it is difficult to conceive of tactical advantage which could have been served by neglecting to advance a claim so clearly in π’s best interest, nor does Δ suggest any.

(3) **Dissent** – Given the uncertain status of the law, the circumstances of the parties, and the close relationship between property division and alimony payment, an ethical, diligent and careful lawyer would have avoided litigation over pension rights and instead would have sought a compensation alimony award for inequity. Δ secured such compensating award.

#### B. Causation of Harm

(1) **Rule:** If a lawyer’s breach of duty to a client occurs in the handling of litigation and the harm suffered is the loss of a recoverable claim, the client will usually be required to prove that the underlying case would have succeeded if it had been properly brought or litigated.

   a. See Smith dissent.

#### C. Standard of Care

(1) **Duty when Negotiating a settlement**

   a. **Majority rule** – Settlements are viewed as a *black box* protected by finality in the absence of fraud, duress or coercion.

   b. **Minority rule** – Allegations by a former client that the lawyer provided incomplete and inaccurate info., relied on by the client, concerning the value of the claims (or other failures of communication) are enough to get the case to a jury.

(2) **Professional Custom Sets the Std**

   a. **Ordinary practitioner** – Standards of practice, *i.e.* customary care, are given great deference. The legal standard is stated in terms of the care provided by the *ordinary practitioner*.

   (i) *But see Gelason v. Title Guarantee Co.,* where a lawyer, instead of checking titles, relied on phone conversations with the title co., which was the customary practice of lawyers in that area of Florida. The Court, citing *TJ Hooper,* said that custom provides *no defense if the custom itself is negligent.*

(3) **Expert testimony**
a. **2 Elements for Exp. Test.** – 1) level of care owed by the attorney; and 2) failure to conform to that level.
   
   (i) *Waldman v. Levine* – Lawyers, without consulting a medical expert in obstetrical matters, advised the client to settle a med mal case for $2K; the client’s claim was that her daughter’s death after childbirth was due to obstetric malpractice. The expert in the legal malpractice case testified that this conduct was “below the minimum standard of care for attorneys in med mal cases.”
   
   ⇢ *Held*: Ct. aff’d jury award against lawyer for $600K.
   
   b. “*So obvious*” – Testimony is unnecessary when the attorney’s lack of care and skill is so obvious that the trier of fact can find negligence as a **matter of common knowledge**.
   
   (i) *Wagenmann v. Adams*, lawyer, representing client who had been arrested for disturbing the peace, told the client that his only alternatives were to leave town immediately or commit himself to a mental hospital. The lawyer took no action to secure the client’s release when the client was involuntarily committed.
   
   ⇢ *Held*: Expert testimony was unnecessary to establish that the lawyer committed malpractice.
   
   (ii) Failure to take any action in real estate matters;
   (iii) Failure to obey client’s instructions; and
   (iv) Failure to sue before expiration of statute of limitations period.

D. **National or Local Standard**

   (1) **Arguments**
   
   a. *National standard* – Forces the upgrading of local performance and makes it easier for *π* to obtain expert witnesses.
   b. *Local Standard* – Lawyers who practice more informally (and more cheaply) in small communities would be disadvantaged by national standards.

   (2) **Referring the Case** – *Horne v. Peckham* – A lawyer, after consulting the client’s accountant, a 2 volume set of Am Jur, and a tax “expert” (with only 1 year of practice), drew up a trust to shelter the client’s money from fed. income taxes. The lawyer botched it, and the trust failed to accomplish this purpose. The lawyer testified he told the client he had “no expertise in tax matters.”
   
   a. *Held* – Ct. aff’d jury verdict against the lawyer for malpractice and approved jury instructions that it is “the duty of an attorney who is a general practitioner to refer his client to a specialist or recommend the assistance of a specialist if under the circumstances a reasonably careful and skillful practitioner would do so.”

III. **OTHER ISSUES**

A. **Violation of Ethical Rules as a Basis for Malpractice**

   (1) **MCPR – Preliminary Statement - Scope**
   
   a. ¶ 18 “Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability.”

   (2) **Relevant and Admissible Evidence** – Expert witnesses in malpractice actions rely on the ethics rules and courts cite them in malpractice decisions.

B. **Limiting Malpractice Liability by Agreement**

   (1) **Prospective Limiting Malpractice Liability**
   
   a. *MRPC 1.8(h) – Conflicts of Interest: Prohibited Txns*
(i) “A lawyer shall not make an agreement prospectively limiting the lawyer’s liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.”

b. In re Tallon (NY App Div ‘82) – Court disciplined a lawyer for having his client sign a general release of all malpractice claims against him without first notifying the client of the nature of her potential claims, withdrawing from the representation and advising her of her right to retain independent representation in the matter.

C. **Malpractice Insurance**
   (1) **Typical Exclusions** – Policies for legal malpractice insurance typically exclude
   a. Claims arising out of **criminal acts of the lawyer**
   b. Claims arising out of **any dishonest, fraudulent or malicious act, error or omission** of the lawyer; and
   c. Punitive or exemplary damages, fines, sanctions or penalties

D. **Vicarious Liability of Partners**
   (1) **Limited Liability Partnerships (LLPs)**
      a. **Partnership assets**: A prevailing malpractice π may satisfy an award out of the assets of the partnership, including its liability insurance coverage.
      b. **Personal assets**: Two groups of firm lawyers remain at risk:
         (i) Any firm lawyer whose negligent act gives rise to liability;
         (ii) Partners with supervisory responsibility on the matter
      c. **Immune**: Statutes/ct rules immunize from liability the partners who did not participate in or supervise the negligent conduct.

§ 4. **CONFIDENTIALITY**

I. **ATTORNEY-CLIENT PRIVILEGE**
   A. **Rest. of Law Governing Lawyers § 118** – A communication made between privileged persons in confidence for the purpose of obtaining or providing legal assistance for the client.
      (1) **A communication**
         a. § 119 – “any expression through which a privileged person ... undertakes to convey information to another privileged person and any document or other record revealing such expression”
      (2) **Made between privileged persons**
         a. § 120 – “the client (including the prospective client), the client’s lawyer, agents of either who facilitate communications between them, and agents of the lawyer who facilitate the representation”
      (3) **In confidence**
         a. § 121 – “A communication is in confidence ... if, at the time and in the circumstances of the communication, the communicating person reasonably believes that no one will learn the contents of the communication except the privileged person ....”
      (4) **For the purpose of obtaining or providing legal assistance for the client.**
         a. § 122 – a communication “made to or to assist a person

B. **Aspects of the Privilege**
(1) A “Client” Seeking “Legal Advice” from a “Lawyer”
   a. Does not protect privacy per se – Does not cover a person seeking business advice or who speaks to a lawyer merely as a friend.
   b. Payment of fee not req’d
   c. Preliminary conversations – protected
   d. Termination of atty-client relationship – Does not end the privilege.

(2) Privileged Communications
   a. Nature – Oral, written, or non-verbal
   b. Documents
      (i) Not preexisting documents or those prepared for another purpose, even if turned over to the lawyer
   c. Physical evidence of crime – Excluded
   d. Not underlying facts – The underlying facts or evidence are not protected by the privilege; only the client’s communication to a lawyer made for the purpose of obtaining legal advice.

(3) A “Communication” “Made in Confidence” – The presence of 3d persons → privilege destroyed.
   a. If after telling the lawyer, the client tells a 3d person → privilege destroyed.

(4) Communications from Lawyer to Client - Courts split
   (i) Classic Wigmore formulation – Limited to communication by a client to lawyer.
   (ii) Alternate approach – Extends the privilege to lawyer statements only when the court finds that the statements in fact reveal the substance of a client confidence.

(5) Joint Clients and Cooperating Parties
   a. Co-client Rule – If two or more persons jointly retain a lawyer to represent them in a matter, communications made by any of the clients to the lawyer on the subject of joint representation are not privileged against use by one joint client against another.
   b. See MRPC 2.2(a)(1) – A lawyer who acts as an intermediary between clients must consult with each client on, inter alia, “the effect on the attorney-client privilege”
   c. Joint defense privilege – Exception to the general rule that disclosure to 3d parties waives the atty-client privilege.
      (i) Facilitates cooperation in litigation and transactions, protects communications only if and so long as a community of interest on one or more issues exists between the parties; and only regarding communications that serve the purpose of advancing the common interest.

(6) 5 Exceptions to the Attorney-Client Privilege
   a. Dispute concerning decedent’s disposition of property;
   b. Client crime or fraud;
   c. Disputes in which a trustee or other fiduciary is charged with a breach of fiduciary duty by a beneficiary; and
   d. Disputes between representatives of an organizational client and constituents of the organization. (Garner doctrine)

C. Corporations and the Attorney-Client Privilege
   (2) Scope of the Corporate Privilege – Rest § 123 – Need to know test:
   a. A communication between any agent of the organization and the organization’s lawyer “concerning a legal matter of interest to the
organization” is privileged if “disclosed only to: “(a) privileged persons; and (b) other agents of the organization who reasonably need to know of the communication in order to act for the organization.”

b. **Comment to § 123** – Broadens the scope of the corporate privilege doctrine by eliminating the qualifying factors mentioned in the Rehnquist Opinion and Burger Concurrence in *Upjohn*

(i) Communications by former employees of an organization are covered if “the former agent has a continuing legal obligation to the principal-organization to furnish the information to the organization’s lawyer”

   $\Leftrightarrow$ Comment [e]

(ii) A communication need not be directed by an organizational superior to be privilege

   $\Leftrightarrow$ Comment [h]

(iii) The communication need not be within the scope of employment of the communicating employee

   $\Leftrightarrow$ Comment e

c. Rest. position makes it easier to apply than the uncertainties of the subject-matter test adopted by *Upjohn*.

(3) **Why a Corporate Privilege?** – Considerations of individual dignity and autonomy that underpin the Fifth Amendment privilege against self-incrimination and the Sixth Amendment right to counsel are limited to natural persons. If the atty-client privilege rests on similar considerations, should artificial legal entities be confined to the work-product immunity?

(4) **Who May Claim the Privilege on Behalf of the Corporation?**

a. **Current management** – Controls the privilege on behalf of the corporation.

b. **Replacement** – When mgmt is replaced, the successor controls the privilege.

   (i) Successor may waive privilege.

c. **Shareholder challenge** – Shareholders in a derivative suit may successfully challenge management’s decision to invoke the privilege and thereby gain access to otherwise confidential corporate communications.

(5) **Speaking With Corporate Employees or Advising Them Not to Speak with Opposing Counsel**

a. **See MRPC 4.2 – Communication with Person Represented by Counsel**

   (i) “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 by law to do so.”

b. **MRPC 3.4(f) – Fairness to Opposing Party and Counsel**

   (i) “A lawyer shall not (f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

   $\Leftrightarrow$ (1) the person is a relative or an employee or other agent of a client; and

   $\Leftrightarrow$ (2) the lawyer reasonably believes that the person’s interests will not be adversely affected by refraining from giving such information.”

(6) **Governmental Clients and Attorney-Client Privilege**

a. **WOLFRAM** – The privilege believe the privilege should be given a narrow reading in this context because of the countervailing policies of open government.

b. FOI statutes contain specific exceptions and the lawyer work-product doctrine provides more limited but essential protection in litigation contexts.
II. **WORK-PRODUCT DOCTRINE**

A. **Protection by Federal Rules & Hickman v. Taylor**
   (1) **FED. RULE CIV. PROC. 26(b)(3)** – Information prepared in anticipation of litigation may be discovered only upon a showing that
   (2) Party seeking discovery has **substantial need** of the materials in preparation of his case; and
   (3) He is unable without undue hardship to obtain the substantial equivalent of the materials by other means.
      a. “In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney ... concerning the litigation.”

B. **Lawyers Mental Impressions and Theories**
   (1) **Majority rule: Upjohn** – Most state courts follow Upjohn, holding that **absent some extreme necessity**, the mental impressions of lawyers are **not discoverable**.
   (2) **Minority rule: Never discoverable** – Some states hold that under no circumstances are mental impressions discoverable. See, e.g., Louisiana and Minnesota.

C. **Material “Prepared in Anticipation of Litigation”**
   (1) **Insurance context** –
      a. **Majority position** – Litigation is not “anticipated” until an attorney has become involved and has either prepared the document herself or requested their preparation.
      b. **Minority position** – Treats virtually all insurance investigations as made in anticipation of litigation.
   (2) **Crime/Fraud Note** – Work-product rules does not cover material prepared as part of a future or ongoing crime or fraud, whether or not in anticipation of litigation.

D. **Who may Invoke the Attorney-Client & Work-Product Protection?**
   (1) **Ownership: Courts split** – Courts disagree as to whether the protection is the client’s, the lawyer’s or belongs to both.
      a. **Majority rule: Rest. § 139** – Work product immunity may be invoked by or for the client on whose behalf it is prepared
      b. **Minority rule: Some courts hold that the lawyer as well as the client must consent to disclosure.**
      c. **Few courts**: Hold that a lawyer in some situations may resist disclosure of work product in the face of a client’s request for it.

E. **Accountants Versus Lawyers**
   (1) **Work-prod immunity not extended to accountant’s tax accrual workpapers**
      a. **U.S. v. Arthur Young** – “Tax accrual workpapers prepared by a corporation’s independent certified public accountant in the course of regular financial audits are [subject to] disclosure in response to an Internal Revenue Service summons.”
   (2) **§ 7525 of IRS Restructuring and Reform Act of 1998** – Extended “with respect to tax advice, the same common law protections of confidentiality which apply to a communication between a taxpayer and an attorney” to “a communication between a taxpayer and any federally authorized tax practitioner.”
      a. **Exceptions**
         (i) Priv. May not be asserted in a **criminal tax matter** before the IRS or federal court; and
         (ii) Priv. Does not apply to **any written communication** between a tax practitioner and a promoter of a tax shelter.

III. **PROFESSIONAL DUTY OF CONFIDENTIALITY**

A. **Two Pervasive Themes**
1. What relationship do the confidentiality rules envision between a lawyer and a client who is engaged in criminal or fraudulent conduct?
   a. Can the lawyer protect herself from civil and criminal liability for the client’s conduct?
2. Do the confidentiality rules properly balance the interests of clients and other societal and individual interests, such as protecting innocent third parties from harm?

B. Policy behind the Rule

1. Comments to MRPC 1.6
   a. [1] The lawyer is part of a judicial system charged with upholding the law. One of the lawyer’s functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights.
   b. [2] The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance.
   c. [3] Almost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal and correct. The common law recognizes that the client’s confidences must be protected from disclosure. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.
   d. [4] A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.
   e. [5] The principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.
   f. [6] The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.

C. Scope of the Duty of Confidentiality – MRPC 1.6

1. (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).
   (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
a. (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or
b. (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client.

(3) Publicly-Available Information as Confidential Information
a. Rule – The lawyer’s obligation not to reveal confidential information applies regardless of whether the info. is publicly known.
   (i) See MRPC 1.9(c)(2) – “A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter: (2) reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.”

b. Generally known information against former client – MRPC 1.9(c)(1)
   (i) “A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter: (1) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known.”

(4) Client Consent and Implied Authority to Reveal
a. MRPC 1.6(a) – Allows disclosure if the client consents after consultation with the lawyer about the consequences of such a decision.
   (i) Comment [7] – “A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation except to the extent that the client’s instructions or special circumstances limit that authority. In litigation, for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed, or in negotiation by making a disclosure that facilitates a satisfactory conclusion.”

(5) Consequences of Breach –
   a. Professional Discipline – In re Pressley, a mother informed her lawyer that she suspected her former husband was abusing their daughter during visitations; the lawyer was disciplined for revealing the client’s suspicions to her former husband’s lawyer, against her instruction.

D. Self-Defense Exception
   (1) 3 Categories of Exceptions
      a. Self defense – Protection of lawyers threatened by a claim or charge brought by the client or a third person (Self-defense exception);
         (i) Client charges lawyer with wrongdoing during course of representation;
         (ii) Lawyer sues the client to enforce some duty owed (e.g. fee payment);
         (iii) Third person accuses a lawyer of wrongdoing in the course of representing a client, perhaps in complicity with the client
                  See MRPC 1.6, cmt [18] (Rule 1.6(b)(2) does not require the lawyer to await commencement of an action or proceeding that charges such complicity; a defense may be established by responding directly to a 3d party who has made such an assertion).
b. **Defense of others** – Protection of innocent third parties who are being or may be victimized by the client; and

c. **Fraud on court** – Prevention or rectification of fraud on the tribunal.

(2) **Myerhofer v. Empire Fire and Marine Ins. Co.** [p 274–78]

a. **Facts:** *Atty disqualification motion.* Empire made a public offering and hired the Sitomer firm. Goldberg was an attorney at the firm and had done work on the issue. Myerhofer, purchased shares of Empire stock, and brought suit. πs were represented by the Bernson firm in a securities case under Form 10K, which Empire filed with the SEC, which revealed that the Registration Statement did not disclose a $200,000 payment to the Sitomer law firm. After the complaint was served on Sitomer, Goldberg was told that he was made a ∆. Goldberg was told by the Bernson firm of the charges against him and requested an opportunity to prove his non-involvement in any such arrangement. When he worked on the deal, Goldberg had expressed a concern over excessive fees. When Goldberg’s view differed from the Sitomer firm’s, Goldberg resigned in 1973. Goldberg appeared before the SEC and placed before it information. Three months later after being informed that he was a ∆ in the securities litigation, Goldberg met with the Bernson firm twice hoping to verify his nonparticipation in the fee question. Bernson firm dropped Goldberg from the suit. The defendants moved to have the Bernson firm and Goldberg barred from acting as counsel or participating with counsel for π in this or any other future action against Empire.

b. **Held:** Under the circumstances, Goldberg had the right to make an appropriate disclosure with respect to his role in the public offering. Concomitantly, he had the right to support his version of the facts with suitable evidence. Since the Bernson firm’s relationship with Goldberg was not tainted by violations of the Code of Prof. Resp., there appears to be no warrant for its disqualification from participation in either this or similar actions.

(3) **Third-Party Charges Against a Lawyer**

a. **Cf.** MRPC 1.13 – Prescribes a course of conduct to be followed when a lawyer knows that an agent of the organizational client is violating a legal obligation to the client or violating the law in a manner that might be imputed to the organization.

b. **But see** MRPC 1.6(b)(2), cmt. [18] – “Where practicable and not prejudicial to the lawyer’s ability to establish the [self-defense exception] defense, the lawyer should advise the client of the third party’s assertions and request that the client respond appropriately.”

(4) **Self-Defense Exception to Attorney-Client Privilege** –

a. **Myerhofer** – Although the case deals only with confidentiality and not the attorney-client privilege, the case has been read as supporting an exception to the privilege where lawyers are accused of wrongdoing in complicity with the client.

IV. **CLIENT FRAUD**

A. **Ethics Code and Client Fraud**

(1) **2 Fundamental Propositions**

a. In all jurisdictions, a lawyer is prohibited from counseling or assisting a client in unlawful conduct;
b. In most jurisdictions, a lawyer is permitted to disclose confidential information to prevent the client from committing or continuing a crime or fraud.

(2) MRPC 1.6(b) – As adopted is a comprehensive and unqualified prohibition of disclosure of any client information, subject only to 3 exceptions:
   a. Homicide/bodily injury exception;
   b. Self-defense exception; and
   c. Implied authority exception.

(3) Noisy Withdrawal – See MRPC 1.6, cmt [16]
   a. “Neither this Rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.”

(4) The Restatement on Prevention and Rectification of Client Fraud – § 117B
   a. Preventing client fraud – § 117B(1) – The lawyer may use or disclose confidential client information when and to the extent the lawyer believes necessary to prevent a crime or fraud and (b) the loss has not yet occurred;
   b. Rectifying past fraud – § 117B(2) – When the loss has “already occurred, a lawyer may use or disclose confidential client info. when and to the extent that the lawyer reasonably believes such use or disclosure is necessary to rectify or mitigate the loss.”

B. Liability of a Lawyer Who Facilitates a Fraudulent Transaction
   (1) Closing your eyes to fraud: Klein v. Boyd
      a. Facts: Drinker Biddle firm of Philadelphia. Client came to lawyer’s office with money in hand to secure a securities broker partnership, Mercer LP. Coleman was a bogus character. He comes to Strouse at Drinker Briddle and provides a disclosure document about the planned partnership, but it left out information. He also started doing the business as Mercer before creating the necessary formal partners. Strouse gave some initial advice to Coleman: prompt preparation of necessary papers making additional disclosures, and these must be provided to those who already invested, who must be given the opportunity to rescind. [This was the right advice.] There was the whiff of a fraud, and an on-going fraud. This was a way to rectify this without any further fraud. Strouse does not follow up to determine whether Coleman actually gave this information to the investor. He does nothing to assure that the investors properly did reaffirm their investment decisions after first having been given reasonable opportunity to do so or rescind. Another disclosure packet, months later → omits info. that Strouse knows should be there. Strouse closes his eyes → becomes an aider to the fraud. He does not sign the disclosure documents himself.
      b. Held: It would be reasonable for a trier of fact to infer that Strouse, who knew that Mercer and the investors’ investments were in serious trouble, was concerned about his reputation of Mercer and the behavior of his client. Although not necessarily in a position to prevent Mercer from engaging in misdeeds, a trier of fact could infer that Strouse did not do all that he should have done to ensure that his clients complied with the law.
         (i) A trier or fact could reasonably infer that Drinker intentionally concealed material info., and that it acted with scienter.
   (2) Scrivener’s Role: Schatz v. Rosenberg (CA4 '91) – Held: A lawyer or law firm cannot be liable for the representations of a client, even if the lawyer incorporates the client’s misrepresentations into legal documents or agreements necessary for
closing the transaction. In this case, [the lawyers] merely “papered the deal,” that is, put into writing the terms on which the Schatzes and Rosenberg agreed and prepared the documents necessary for closing the transaction. [The firm] performed the role of scrivener. Under these circumstances, a law firm cannot be held liable for misrepresentations made by a client in a financial disclosure statement.

C. Lawyer Liability for Facilitating Client Transactions that Defraud Third Persons

(1) Making False Statements to Others: MRPC 4.1 – Truthfulness in Statements to others
a. In the course of representing a client a lawyer shall not knowingly:
   (i) (a) make a false statement of material fact or law to a third person; or
   (ii) (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

b. Cmt [1] – “A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by failure to act.”

D. O.P.M.: A Case Study and Its Lessons

(1) Lessons of O.P.M. and Other Client Fraud Cases
a. Rely on your instincts, feelings and the known (or easily discoverable facts) about people in deciding whether to accept or continue representation.
b. Don’t pretend you or your firm are invulnerable.
c. It pays to be fussy about the details of transactions.
d. Take disclaimers in opinion letters, prospectuses, etc., very seriously.
e. Look at all of the law that governs lawyers, not just lawyer codes in isolation.
f. Learn about a major client’s business and ask about sudden changes in practice.
g. Inquire closely into a client’s termination of any long-term advisors.
h. If possible, avoid becoming dependent on a single client unless you have great confidence in the integrity and soundness of its owners and managers.
i. Don’t assume the attorney-client privilege or the work-product immunity will protect legal files or lawyer-client communications.

§ 5. Duty to the Court

I. Perjury

A. Perjury in Civil Cases

(1) Professional Ethics Committee of Iowa v. William Crary [p 339–45]
   a. Facts: Client with whom lawyer was sexually involved was seeking a divorce from her husband. She lied in a deposition of her whereabouts on a certain date, when she was in fact with the lawyer (Δ). The lawyer did not seek to recess the deposition during the perjury or hold the client from falsely testifying.
   b. Held: The lawyer acted unethically in knowingly permitting the client to commit perjury on the first day of the deposition and to resume the perjury two days later, and that in so doing he violated Iowa law.
      (i) License revoked.

(2) Ethics Rules on Presenting False Evidence
a. **Fraud on court handled harshly** – Unlike the ethics rules re prevention or rectification of transactional fraud, the rules re fraud on the court express a normative message similar to that expressed by criminal and civil law.

b. **MRPC 3.3(a) – Candor Toward a Tribunal**
   (i) 3.3(a)(1) – Prohibits making false statements to a court
       – Written & Oral
   (ii) 3.3(a)(4) – Prohibits submitting false evidence
       – Written & Oral
       – Remedial Measures - Lawyer must act upon discovery that evidence she thought was truthful when submitted is not.
   (iii) 3.3(b) – Duty of candor to the court trumps the duty of confidentiality when the two conflict.
   (iv) 3.3(c) – Lawyer has discretion to refuse to offer evidence that the lawyer “reasonably believes is false.”
   (v) 3.3(d) – Requires the lawyer in an ex parte proceeding to inform the judge of “all material facts known to the lawyer” that as Cmt 15 explains, “the lawyer reasonably believes are necessary for the judge to reach an informed decision,” whether or not the facts are adverse.

(3) **Disciplining Lawyers Actively or Tacitly Participating in Presenting False Evidence**
   a. **Rule** – If it is discovered that a lawyer has sat silently by while her client or witness testified falsely, the discipline is severe. See also In re Mack (indefinite suspension for lawyer who neither advised his client to correct false testimony, nor himself disclosed to the court or his adversary that the proffered testimony was untrue).

(4) **Criminal Penalties for Presenting False Evidence**
   a. **Subornation of Perjury** – Subornation of perjury, see, e.g., 18 U.S.C. § 1621, requires that perjury actually have been committed, but a lawyer may be convicted of obstructing justice or conspiracy to obstruct justice for advising a client or witness to lie even if the perjurious testimony is never offered in court.
   b. **Submitting false doc’s** – A lawyer may be criminally liable for submitting false documents on behalf of a client. See, e.g., U.S. v. Lopez (CA11 ‘84) (lawyer convicted under 18 USC § 1001 for falsifying the dates on his client’s application for permanent resident status).
   c. **Perjury** – Any lie under oath may be perjury as long as the lie was (1) willful and (2) about a matter material to the proceeding.
      (i) **Materiality** – Viewed broadly and is assessed at the time the statement was made.

(5) **False Evidence Offered by the Opposing Party**
   a. **Duty to remedy** – Under the MRPC, the duty not to offer false evidence and the duty to remedy is limited to the offering lawyer.
   b. **No more adversarial** – Once the proceedings lose their adversarial character, e.g., in joint application for settlement approval, both lawyers may have a duty to correct the false representations of the other party.

B. **Perjury in Criminal Cases**
   (1) **FREEDMAN “PERJURY: THE LAWYER’S TRILEMMA”** – Freedman’s position, adopted in D.C., gives the lawyer discretion to reveal a client’s intent to bribe or intimidate judges, witnesses or jurors, but prohibits disclosure of intended client perjury of a criminal Δ or past fraud on the court when disclosure would reveal client confidences.
§ 6. LAWYER-CLIENT RELATIONSHIP

I. INTRODUCTORY NOTE
   A. 3 Models
      (1) Fiduciary model – Draws on a legal and professional tradition that views a client as dependent upon her lawyer’s skill and knowledge. Client must take a leap of faith and trust her lawyer to provide loyal, competent and diligent service.
      (2) Market model – Views the relationship as a consensual exchange that benefits both lawyer and client.
         a. Client benefits from receiving services conforming to contract terms and market standards;
         b. Lawyer benefits from receiving payment for services rendered.
      (3) Regulatory/Public Utility Model – Views lawyers as quasi-public officials performing important public functions. Dispute resolution and other legal tasks are vital to the community so they must be closely regulated to service public objectives of legitimacy, finality, fairness and efficiency.
   B. Who’s in Charge?
   C. Paternalism and Manipulation
   D. Who Corrupts Whom?
   E. One Profession or Many?
   F. Lawyer-Client Interaction

II. FORMING AND ENDING THE RELATIONSHIP
   A. Forming the Relationship → “Client” perception
      (1) Togstad v Vesely, Otto et al. [p. 457–61] (Minn. 1980)
         a. Facts: Fourteen months after Mrs. Togstad’s husband became paralyzed due to medical malpractice, she contacted Miller at the Vesely Otto firm to determine whether she had a viable law suit. At the conclusion of her meeting with Miller, Mrs. Togstad testified that Miller said that “he did not think we had a legal case, however, he was going to discuss this with his partner.” She understood that if Miller changed his mind after talking to his partner, he would call her. After she did not hear from Miller, she assumed she had no case. Mrs. Togstad also denied that Miller told her that his firm did not have expertise in the med mal field. Afterward, Togstad sued the firm arguing legal malpractice for failing to perform the minimal research that an ordinarily prudent attorney would do before rendering legal advice in a case of this nature. The Δs argued that there was no lawyer-client relationship.
         b. Held: Based on the testimony of Mrs. Togstad, that she requested and received legal advice from Miller re the malpractice claim, the Δ’s contention that there was no relationship is rejected. It was reasonable for a jury to determine that Miller acted negligently in failing to inform Mrs. Togstad of the applicable limitations period.
      (2) Obligations to a Prospective Client
         a. Rule: A lawyer’s interaction with a potential client may invoke some of the lawyer’s duties to clients, such as confidentiality or due care, without becoming a full-fledged representation.
      (3) Limiting Liability by Limiting the Scope of Employment
a. MRPC 1.2(c) – “A lawyer may limit the objectives of the representation if the client consents after consultation.”

(i) MRPC 1.2, cmt. [4] – “The objectives or scope of services provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer’s services are made available to the client. The terms upon which representation is undertaken may exclude specific objectives or means. Such limitations may exclude objectives or means that the lawyer regards as repugnant or imprudent.”

(ii) Limitation - MRPC 1.2, cmt. [5] – “An agreement concerning the scope of representation must accord with the Rules of Professional Conduct and other law. Thus, the client may not be asked to agree to representation so limited in scope as to violate Rule 1.1, or to surrender the right to terminate the lawyer’s services or the right to settle litigation that the lawyer might wish to continue.”

(4) Choice of Client – No obligation to represent a client.

a. MRPC 6.2, cmt. [1] – “A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant. The lawyer’s freedom to select clients is, however, qualified. All lawyers have a responsibility to assist in providing pro bono publico service. See Rule 6.1. An individual lawyer fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients. A lawyer may also be subject to appointment by a court to serve unpopular clients or persons unable to afford legal services.”

B. Terminating the Relationship

(1) Mandatory Withdrawal

a. MRPC 1.16(a) – “Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(i) (1) the representation will result in violation of the rules of professional conduct or other law;

(ii) (2) the lawyer’s physical or mental condition materially impairs the lawyer’s ability to represent the client; or

(iii) (3) the lawyer is discharged.”

b. For 1.16(a)(1) – Consider:

(i) Prohibition against lawyer participation in criminal or fraudulent conduct; MRPC 1.2(d)

(ii) Provisions requiring or permitting disclosure of client fraud; MRPC 1.6(b)

(iii) Provisions requiring disclosure of fraud on the court. MRPC 3.3. See also MRPC 2.3 (evaluations conducted for 3d parties), 4.1 (honesty in dealing with nonclients).

(2) Permissive Withdrawal

a. MRPC 1.16(b) – “[E]xcept as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

(i) (1) the client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes is criminal or fraudulent;

(ii) (2) the client has used the lawyer’s services to perpetrate a crime or fraud;

(iii) (3) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;
(iv) (4) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer’s services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(v) (5) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(vi) (6) other good cause for withdrawal exists.”

b. Judge may order a lawyer to continue – MRPC 1.16(c)

(3) Protecting a Client Upon Withdrawal

a. MRPC 1.16(d) – “Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client’s interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law.”

(4) Client Access to Lawyer’s File

a. Issue: When a client is contemplating a malpractice suit, switches lawyers, or when the lawyer moves to another firms, the client typically asks for the documents. When is the client “entitled” the documents?

b. Sage Realty Corp v Proskauer Rose (NY 1997) – A real estate developer parted company with Proskauer, which had represented it in a complex $175MM real estate restructuring transaction. When the firm asked Proskauer for its files, the firm said it would turn over formal legal opinions, court filings and closing documents, but not its internal work product. Developer sued to obtain copies of the complete file.

(i) Held – The client was presumptively entitled to the complete file, save for limited exceptions such as documents intended for internal law firm use.

C. Discharge and Its Consequences

(1) Basic Start

a. A client may discharge a lawyer at any time with or without good cause.

(i) Litigation proceedings – Approval of a tribunal is required if the matter is a litigated proceeding.

☞ Eve of trial – Leave to discharge is unlikely on the eve of or during trial.

b. Public agency or subsidy – Where a public agency or subsidy provides counsel to a poor person, practical and institutional limitations narrow or extinguish the client’s freedom of choice, since the only alternative may be pro se representation.

(2) Rules relating to discharge

a. No prospective waiver: A client’s contractual waiver of the right to discharge a lawyer is generally unenforceable as against public policy;

b. Prospective fee arrangement: A reasonable contractual providing addressing liability for fees of terminated counsel may be enforceable if the client is an experienced user of legal services and the liquidated damages provision is reasonable in amount; and

c. Quantum meruit recovery: In most jurisdictions, a discharged lawyer may recover only the quantum meruit value of the services performed.

(3) The Modern Rule on Discharge of a Contingent Fee Lawyer

a. Quantum meruit not contract – All modern cases have agreed that recovery in quantum meruit should replace recovery on the contract;
b. **Serious violation → forfeiture** – When the lawyer has committed a clear and serious violation of a duty owed to the client, the lawyer forfeits any right to compensation whether discharged by the client or not.

## § 7. Conflicts of Interest

### I. Introduction

A. **The Several Faces of Conflict**
   
   (1) **Between clients**: 2 Basic Conflicts – Concurrent and Successive
   
   (2) **Client and 3d Party** – Example: Lawyer for corporations – shareholder interests conflicting with management; Insurance co. and insured; Partners.
   
   (3) **Entire firm disqualified**?

### II. Concurrent Representation in Litigation

A. **Introduction: Divergent Interests and Antagonism**

   (1) 2 Basic Situations
   
   a. When the interest of one client run counter to those of another client and
   
   b. When the antagonism between the two clients is great.

B. **Professional Rules on Concurrent Representation**

   (1) **MRPC Provisions Implicated**
   
   a. Rules 1.7 through 1.15, 2.2, 2.3 codify the case law.
   
   b. MRPC 1.16, 2.1 are also relevant when withdrawal would prejudice the client.
   
   c. MRPC 2.1 speaks of professional judgment that is unaffected by conflicting interests.

   (2) **Interests “Directly Adverse”**
   
   a. **MRPC 1.7(a)** prohibits representation of a client whose interests are *directly adverse* to another client’s interests *unless*:

      (i) The lawyer reasonably believes that the representation will not *adversely affect* the relationship with the other client; and
   
      (ii) Each client consents after consultation.
   
   b. **MRPC 1.7, cmt. [8]** – Acting as an advocate *against* the client: “For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer’s relationship with the enterprise or conduct of the suit and if both clients consent upon consultation.”

   (3) **Representation “Materially Limited”**
   
   a. **MRPC 1.7(b)** – “A lawyer shall not represent a client if the representation of that client may be *materially limited* by the lawyer’s responsibilities to another client or to a third person, or by the lawyer’s own interests, *unless*:

      (i) (1) the lawyer reasonably believes the representation will not be adversely affected; and
   
      (ii) (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.”

   b. **Lawyer’s own interests**

      (i) **MRPC 1.8** – Covers a series of situations involving conflicts between a lawyer’s own interests and those of a client and details the conditions under which a lawyer may proceed, if at all, in each of those situations.

   c. **Lawyer as intermediary** – See **MRPC 2.2**

(4) **Per Se Bans on Concurrent Representation**
a. Great reluctance due to respect for client’s right to select counsel of her own choosing, and within limits, the kind of representation as between full-blown partisanship and intermediation.

C. Concurrent Representation in Civil Litigation

   a. Facts: K&E’s Washington D.C. office was working for API for lobbying efforts in opposition to legislative divestiture and arguing that relatively high concentration ratios in the uranium industry can be expected to decline, that current increases in uranium prices are the result of increasing demand, that oil company entry into uranium production, and that the historical record refutes any charged that the oil co’s restricted uranium output. K&E’s Chicago office represented Westinghouse as π in an private antitrust action against 12 foreign and 17 domestic corporations engaged in various aspects of the uranium industry.
   b. Held: The oil companies (who were associated with API) each entertained a reasonable belief that it was submitting confidential info. regarding its involvement in the uranium industry to a law firm which had solicited the info. upon a representation that the firm was acting in an undivided interest. Therefore, Westinghouse had the option and choice of dismissing Gulf, Kerr-McGee and Getty from the antitrust case or discharging K&E as its attorney in the case.

(2) Positional conflicts
   a. Antagonistic positions allowable → unless appellate level
      (i) MRPC 1.7, cmt [9] – “A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected. Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the same time in an appellate court.”

(3) Who Qualifies as a Client for Purposes of the Conflicts Rules?
   a. IBM v. Levin (CA3 ’78) – Law firm was disqualified from representing a computer leasing firm in an antitrust action against IBM because the firm had represented IBM on various labor matters over a number of years.

(4) Advance Waiver of Conflicts
   a. Future waivers – Firms increasingly employ provisions in retainer agreements whereby the client agrees to waive certain future conflicts should they arise. These provisions usually relate to successive conflicts, but sometimes apply to concurrent representation.
   b. In re Boone – Held that lawyer could not subsequently represent the client’s opponent in the same matter, because the client “cannot enter into an agreement whereby he consents that the attorney may be released from all the duties, burdens, obligations, and privileges pertaining to the duty of the attorney and client.”
   c. ABA Formal Opinion 93-372 – Narrow role for advance waivers. For an advance waiver to be effective, it must describe the future waiver “with sufficient clarity so the client’s consent can be reasonably viewed as having been fully informed when it was given.”

(5) Procedures to Discover Conflicts
   a. See MRPC 1.7, cmt [1] – Calls on lawyers to adopt “reasonable procedures, appropriate for the size and type of firm and practice” to discover conflicts.

(6) Definition of “Firm”
Typically – Lawyers in the same firm are generally treated as a **single** lawyer for purposes of conflict of interest. See MRPC 1.10(a)

Sharing office space – MRPC 1.10, cmt [1]

(i) “Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way suggesting that they are a firm or conduct themselves as a firm, they should be regarded as a firm for the purposes of the Rules.”

**Lawyers Related to Other Lawyers**

a. MRPC 1.8(i) – “A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent a client in a representation directly adverse to a person whom the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship.”

b. **Dating?** – See MRPC 1.7(a) \rightarrow same effect as MRPC 1.8(i)

(i) See, e.g., *People v. Jackson* (Cal App '85) (conviction reversed when ∆ claimed ineffective assistance of counsel because his lawyer was involved in an ongoing romantic relationship with the prosecutor that she did not disclose to the ∆).

**Fiandaca v. Cunningham** [p 595–602] (CA7 '78)

a. **Facts:** Public interest firm representing female convicts in suit to get equal conditions as men. They also represented mental health patients. The State of NH offered a settlement that caused a conflict of interest because they offered to let the female convicts stay in the mental health facility. The trial court refused to disqualify the public interest firm because the female convict case was too close to trial. (There is a hint of unfair tactics on the part of the NH Atty General’s offer.)

b. **Held:** On appeal, and the ct. finds *there is a disqualifying conflict*, but finds that the disqualifying conflict was material only to the remedy phase, i.e. moving the prisoners to the mental health facility. Even though the lawyers had conflicting loyalties—not in the same legal matter—were not of consequence to the merits of whether the State of NH was discriminating against the female convicts.

**Conflicts Caused by Opposing Party’s Actions**

a. **Standing** – Most courts do not require any special showing of standing before entertaining a motion to disqualify based on conflict of interest.

(i) Typically, a motion to disqualify is made by an opposing party or interest.

**Judicial Impatience with Disqualification Motions: Estoppel and Appealability**

a. **Lower court determines** – Impatient with the frequency of disqualification motions and their use as instruments of delay, the courts have made it nearly impossible for lawyers to obtain review of a trial court’s disposition of a disqualification motion.

b. **Showing prejudice?** – If a client appeals after a final judgment, claiming that the grant or denial of a disqualification motion was reversible error, the client will be unlikely to be able to show prejudice.

**Curing a Simultaneous Conflict**

a. **Picker International** – A newly merged law firm found itself representing clients directly adverse in unrelated matters. The court held that the
conflict could not be cured by dropping one client. Had the lawyers successfully withdrawn from the litigation prior to the merger, the cause would be analyzed as one of successive representation.

(i) Because a lawyer may oppose former clients in matters unrelated to the previous representation, the newly merged firm would be allowed to proceed.

D. Remedies for Conflicts of Interest

(1) Options
a. Discipline under the professional rules
b. Breach of duty → malpractice
c. Fee forfeiture
d. Criminal penalties for conflict of interest violations on the part of government employees, former government employees, and those dealing with the government.
e. Evidence exclusion – where lawyer tries to use info. from former client
f. Most common sanction – Disqualification of the client’s lawyer (e.g. Westinghouse).

(2) Use of a Disqualified Lawyer’s Work
a. Tainted evidence excluded – First Wisc. Mortgage Trust (only that work product which is “tainted by virtue of having been based upon confidential knowledge or other advantage gained or from the dual representation” should be unavailable to the successor counsel).

III. Concurrent Representation in Transactions

A. Representing Both Parties to a Transaction

(1) Full Disclosure - State v. Callahan [p 618–21]

a. Facts: Disciplinary proceedings against lawyer who helped an elderly lady (Fulton) with some real estate transactions. Fulton believed the lawyer would act as a Cal. escrow officer would and protect the interest of both parties. The lawyer testified that he believed he represented both parties merely as a scrivener to draw the papers and close the sale only after the terms of the purchase agreement had been negotiated.

(i) Hearing Panel Finding – Found that the lawyer violated the Model Code by representing both seller and buyer when a conflict existed by failing to warn the sellers they did not have a perfected second mortgage or security interest.

(ii) Held: We fail to see how the lawyer could have been unaware that he was not exercising his independent prof. judgment in behalf of the Fultons in preparing the contract solely on the terms dictated by the buyers without consulting the sellers (Fultons). He also failed to tell the Fultons of his close business and professional associations with the buyer.

b. Full disclosure under the Model Rules - MRPC 1.7(b)(2) – “When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.”


(3) “Full Disclosure” as Predicate of Consent

a. Tension – When one of two or more joint clients insist that the shared lawyer keep information in confidence, i.e. not tell the other joint client some piece of info. relevant to joint representation, what must a lawyer do?
MRPC 2.2, cmt [6] – “In a common representation, the lawyer is still required both to keep each client adequately informed and to maintain confidentiality of information relating to the representation. See Rules 1.4 and 1.6. Complying with both requirements while acting as intermediary requires a delicate balance. If the balance cannot be maintained, the common representation is improper.”

(4) Confidentiality and Joint Clients
a. Massachusetts Rule 1.7, cmt 12c – Each client should be advised at the outset of the joint representation that making such a request will, in all likelihood, make it impossible for the lawyer to continue joint representation. Each client has a right to expect that the lawyer will tell the client anything bearing on the representation that might affect the client’s interests.
b. A v. B (NJ 1999) – Held that a firm representing both the husband and wife in drafting their wills had the discretion to tell the wife that the husband had an illegitimate child, a fact learned not from the husband but from another source after the wills were executed.

(5) Representing Buyer and Seller
a. In re Banta – Lawyer was reprimanded for having relayed to the buyer inaccurate facts given to the lawyer by the seller.
b. Facilitating a deal – May be proper under certain circumstances, but when the lawyer has a longstanding relationship with one party and a new relationship with the other, it may be unreasonable to believe that she could represent both.

(6) Ethics Rules on Lawyer as Intermediary
a. MRPC 2.2 – Elaborate set of provision
(i) 2.2(a)(1) – Issues the lawyer should discuss with the clients before obtaining their consent
(ii) 2.2(a)(2) and (a)(3) – Require that the lawyer reasonably believe the matter can be resolved on terms compatible with the clients’ best interests
   ▶ each client will be able to make informed decisions;
   ▶ material prejudice to either client’s interest if the contemplated resolution fails is unlikely;
   ▶ the common representation can be undertaken impartially and without improper effect on the responsibilities the lawyer has to the client.
(iii) 2.2(b) – How the lawyer should proceed while acting as an intermediary;
(iv) 2.2(c) – Withdrawal – The lawyer must withdraw if either client requests or if the lawyer can no longer meet the req’ts of 2.2(a).

B. Lawyer’s Role in Matrimonial Matters
(1) Matrimonial Dissolution – A single lawyer cannot represent both spouses in the courtroom phase of divorce cases.
a. Disagreement on whether a lawyer with informed consent may negotiate a separation arrangement and draft other papers dealing with property division or child custody.

(2) Divorce Mediation – Governed by MRPC 2.2, as a lawyer engaged in joint representation.
a. **Ass’n of the Bar of the City of New York – Ethics Opinion – 5 factors →**
   
   **Written agreement:**
   
   (i) The parties are fully advised of the risks (including sharing of confidences)
   
   (ii) The lawyer is satisfied the parties understand the risks;
   
   (iii) Legal advice is given only to both parties in each others’ presence;
   
   (iv) The parties are advised of the advantages of seeking independent counsel;
   
   (v) Lawyer does not represent *either* party in any subsequent legal proceedings re the divorce.

(3) **Joint Representation in Estate Planning** – Lawyer should make it clear that all material communication from each spouse relating to the estate plan are *not confidential* as to the other spouse.

C. **Joint Representation for Business Ventures**

(1) “Lawyer for the Situation” – Louis Brandeis

D. **Representing an Insured Person upon Request of an Insurer**

(1) **MRPC 1.8(f)** – Provides that a lawyer shall not accept payment from another legal services to a client *unless*

   a. The client consents after consultation;
   
   b. There is no interference with the lawyer’s independence or professional judgment or with the client-lawyer relationship; and
   
   c. Information relating to representation of the client is protected as required by Rule 1.6 (confidentiality).

(2) **MRPC 1.8(b)** – “[A] lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation.”

(3) **Coverage Questions**

(4) **Settling an Insurance Claim**

   a. **Duty-to-settle doctrine:** *Crisci v. Security Insurance Co.* – When there is a great risk of a recovery beyond the policy limits so that the most reasonable manner of disposing of the claim is a settlement which can be made within those limits, a consideration in good faith of the insured’s interest requires the insurer to settle the claim.

   b. **Lysick v. Walcom** – Insurer authorized counsel to settle for the policy limit, $10,000. When defense counsel finally tendered the policy limit, the π rejected the offer. At trial, the jury returned a verdict for π for $225K. The insured settled its bad faith claim against the insurer for $89K. The insurer, in turn, sued defense counsel for malpractice.

   (i) Held for carrier, holding counsel liable for the excess.

IV. **SUCCESSIVE CONFLICTS**

A. **Successive Representation of Joint Clients**

(1) **Model Rules**

   a. **MRPC 1.9(a)** – Provides that a lawyer shall not “represent another person in the same or a substantially related manner in which that person’s interests are materially adverse to the interests of the former client unless the former client consents after consultation.”

   (i) Rule applies only when the *new* client’s interests are *materially adverse* to those of the former client → **substantial relationship test.**

   (ii) **Consent enough** – Former client’s consent (after consultation) is sufficient to cure the cure the conflict.
MRPC 1.9 not “consent plus” like Rule 1.7 (requiring that the representation be objectively reasonable).

b. Continuing duty of confidentiality – MRPC 1.9(c) – Even if the former client consents under 1.9(a) to the new representation, that consent does not obviate the lawyer’s continuing duty of confidentiality.

(i) MRPC 1.9(b), as amended in ’89, is concerned with imputed disqualification.

(2) Former Government Lawyer – MRPC 1.11

a. Firm not disqualified – MRPC. 1.11(b) – “A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom.”

(3) Brennan’s Inc v. Brennan’s Restaurants, Inc. [p 642–45]

a. Facts: Wegmann was the family lawyer, and after the feud erupted, he got caught in the middle. When he was serving the whole family, he helped them obtain a registered trademark of the group: a rooster. When the fallout occurred, both sides of the feud wanted to use the rooster. The sister used the rooster, and the brother sued. Wegmann defended the sister, and then he counterclaimed that the trademark (he obtained) was unenforceable. The plaintiffs (brother) moved to disqualify Wegmann.

b. Conclusion: There was no basis for disqualifying Wegmann because of the risk of misuse of the client’s confidences. Why? When Wegmann represented everyday, the joint rule of confidences precludes any expectation that the confidences would not be shared, at least with the other clients. There was no explicit agreement. Therefore, those confidences would be shared by Wegmann. There are no confidences at stake. But cf. Myerhofer. The court concludes the other lawyer is not disabled because he received no tainted info. The Brennans case shows is that it’s not just confidences about which we’re talking.

a. Wegmann is disqualified because of residual loyalty considerations – He is switching sides in a substantially related matter where he is attacking his own work. That is intolerable under the ethical tradition. Sprung is not disqualified because he had no relationship with the former family, and he has no residual loyalty interests at issue.

(4) Loyalty and Successive Representation

a. Rest. § 213 – A lawyer may not proceed adversely to a former client in the same or substantially related matter if either the lawyer acquired confidential info (now generally known) during the first rep’n that would be useful in the second rep’n or the second matter “involves work the lawyer performed for the former client.”

(5) Primary and Secondary Clients?

a. Minority rule: Distinction – When a joint representation terminates, the lawyer may continue to represent the primary client against the secondary one. See Allegaert v. Perot (holding that the substantial relationship test is inapplicable where a law firm’s alleged disqualification arises out of the simultaneous representation of two clients if each client was aware of the other’s relationship to the firm and had no reason to believe that confidences of one party would be withheld from the other).
b. **Equal loyalty** – Conventional doctrine is that a lawyer owes “equal” loyalty to every client. *Cf.* MRPC 2.2, cmt [7] (intermediation is improper when impartiality cannot be maintained).

(6) **Duty of Loyalty to a Former Client**

a. **2 Underlying Concerns** *(Brennans)*

(i) Duty to preserve confidences

(ii) Duty of loyalty to a former client

◊ Courts are not of one mind on whether to demand relatively strict loyalty to a former client, at the cost of requiring one or both parties to get new lawyers if they have a falling out, or to avoid that cost through a more relaxed standard of loyalty

◊ **Compare MRPC 2.2** (clear that if intermediation fails → *lawyer can’t represent either client* in the subject matter of the intermediation) *with Rest. § 201, cmt d* (making explicit that co-clients may agree at the onset of the representation that in the event of fallout, the lawyer may continue to represent one of the two of them).

B. **Substantial Relationship Test**


a. **Facts:** American and Continental had a spat, in which Continental filed suit against American for attempted monopolization. Vinson & Elkins was hired by Northwest (on Continental’s side), but had represented American in prior antitrust matters. American argued that VE must be disqualified because it represented American on matters *substantially related* to the present case.

b. **Rule – Substantial Relationship test:** A party seeking to disqualify opposing counsel on the ground of former representation must establish 2 elements:

   (i) An **actual** attorney-client relationship between the moving party and the attorney he seeks to disqualify; and

   (ii) A **substantial relationship** between the subject matter of the former and present representations.

◊ **2 Questions:**

   1. Will the current representation, in reasonable probability involve the use of confidential information?

      a. Public knowledge does not matter

   2. Are the specific subject matters, issues, and causes of action common to prior and present representations?

   c. **Held:** VE was **disqualified** because its prior representations of American were in substantially related matters.

(2) **Are the Matters “Substantially Related”?**

a. **Rest. § 213 test for Substantially related** –

   (i) The current matter involves the work the lawyer performed for the former client; or

   (ii) There is a substantial risk that representation of the present client will involve the use of info. acquired in the course of representing the former client, unless that information has become generally known.

(3) **Competition as an Adverse Interest**

a. **MRPC 1.7, cmt [3]** – “[A] lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated. On the other hand, simultaneous representation in unrelated
matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients."

b. **Fiduciary duties not supplanted by ethical rule provisions** – See *Maritrans GP Inc., v. Pepper, Hamilton & Scheetz*.

(4) **Taint Shopping**

a. **MRPC – Scope** – The client-lawyer relationship does not exist until the client has asked the lawyer to render service and the lawyer has agreed, but that “some duties, such as the duty of confidentiality ... may attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established.”

   (i) *Don’t get confidential info. re: case merits!*

§ 8. **P R O F E S S I O N A L D I S C I P L I N E**


A. **Model Rules**

   (1) **MRPC 8.3** – Requires a lawyer to report **only those violations** that raise “a substantial question as to the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects”

   (2) **MRPC 8.3(C)** – Rules do **not require** a lawyer to report if knowledge of the violation is based on information protected by the professional duty of confidentiality.

B. **Squeal Rule versus Attorney-Client Privilege**

   (1) **In re Himmel**

      a. **Facts**: Casey hired by Forsberg to handle a PI claim. Casey settled the case, but converted part of the settlement check belonging to Forsberg. Forsberg, after complaining about Casey to the Ill. disciplinary agency, retained Himmel to collect. Casey agreed to pay Himmel a settlement of any of Forsberg’s claims against him and not to initiate proceedings. When Casey failed to pay, Himmel brought a breach of **k suit against him**, resulting in a $100,000 judgment against Casey. Afterward, Casey was disbarred by consent for misconduct unrelated to Forsberg. In 1986, the ARDC filed a complaint against Himmel for **failing to report** Casey’s misconduct.

      b. **Held**: The information Himmel possessed regarding Casey’s conduct was not protected by the attorney-client privilege. Information voluntarily disclosed by a client to an attorney, in the presence of 3d parties is not privileged, and Forsberg discussed this with her mother and fiancé. Himmel possessed *unprivileged knowledge of Casey’s conversion of client funds*. Failure to report resulted in interference with the ARDC’s investigation of Casey, and thus the administration of justice. Himmel suspended for 1 year.

      c. **Note**: Under the MRPC, the information **would** have been protected as confidential, see Rule 1.6.

C. **Scope of Duty to Report**

   (1) **MRPC 8.3** – Requires a lawyer to report information “not otherwise protected as a confidence by these Rules or other law.”

D. **Extortion as Prohibited Assistance**

   (1) **MRPC less stringent than Model Code**

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a. Model Code 7–105(A) provided that “A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.”

b. MRPC → no similar provision.

(i) ABA Comm. on Ethics and Prof. Resp., Op. 94-383 (1994) (threatening to file a complaint against opposing counsel to obtain an advantage in a civil case is “constrained,” even though not directly addressed by the MRPC).

II. LAW FIRMS AND THE ORGANIZED BAR

A. Responsibilities of Junior and Senior Lawyers

(1) Safe Harbor for Subordinate Lawyers under MRPC

a. MRPC 5.2(b) – “A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer’s reasonable resolution of an arguable question of professional duty.”

(2) Obligation to Supervise

a. MRPC 5.1(b) – “A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.”

(3) Supervisor assuming responsibility for subordinate

a. MRPC 5.1(c) – “A lawyer shall be responsible for another lawyer’s violation of the Rules of Professional Conduct if:

(i) (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(ii) (2) the lawyer is a partner in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

b. MRPC 5.1, cmt [5] – “Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the supervisory lawyer even though it does not entail a violation of paragraph (c) because there was no direction, ratification or knowledge of the violation.”

c. MRPC 8.4(a) – “It is professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.”

(4) Murphy & Demory, Ltd. v. Murphy (Cir. Ct. Va ’94) – Trial judge in VA found Pillsbury firm to have mishandled a serious conflict of interest problem favoring one of two owners of its corporate client over the other, to the possible detriment of the entity.

a. A powerful figure in the Pillsbury firm’s D.C. office, partner with responsibility for the matter, turned out to be the person who made all the decisions—even though other lawyers working on the matter raised the conflicts question.

b. Held: Supervisory lawyer and senior associate liable for malpractice.

(i) See MRPC 5.2 (“(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer’s reasonable resolution of an arguable question of professional duty.”)

☞ Supervising attorney → did not reach a reasonable decision.

☞ See also MRPC 8.3 (Squeal rule)
B. Discipline for Law Firms

(1) **Small firms** – Presently, lawyers in firms of twenty or more are almost never subject to professional discipline.

(2) **See MRPC 5.1, cmt [2]** – “The measures required to fulfill the responsibility prescribed in paragraphs (a) and (b) can depend on the firm’s structure and the nature of its practice. In a small firm, informal supervision and occasional admonition ordinarily might be sufficient. In a large firm, or in practice situations in which intensely difficult ethical problems frequently arise, more elaborate procedures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. See Rule 5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members and a lawyer having authority over the work of another may not assume that the subordinate lawyer will inevitably conform to the Rules.”

(3) **Need for conflict-screening procedures and mechanisms**
   a. **See MRPC 5.1(a)** – “A partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.”