MRPC Checklist

ACCESS TO EVIDENCE
- FRCP 35 – Right to discovery
- 3.4a – No unlawful obstruction → access to evidence, or alter, destroy, conceal.
- 1.2d – Don’t tell or help a client to engage in crime/fraud → but help deter client conduct
- 8.4b – Prof misconduct to commit a criminal act reflecting adversely on hon’ty, trustworth’ss, or fitness
- Turn over crim evidence unless –
  - Created as part of defense
  - Evidence state can’t compel
- Records - Business rec’ds usually not protected by A/C priv.

CONFORMITY TO THE LAW
- 1.2d – Don’t tell or help a client engage in crime/fraud
  - Counsel client → deter conduct
- No prepay legal services for criminal work – In re disbarment proceedings
- Benjamin – Don’t shut your eyes to what was planly seen
- Obstruction of justice – 18 USC § 1503, Cirtolo (convicted even though giving advice isn’t unlawful)
- Mail fraud – Lawyer misappropriating info of firm/client for personal gain. See Carpenter.
- RICO – Law firm may be criminal enterprise. Teitler
- Payment from crime proceeds – Know? → Possession of stolen property

NEGLECTED MISREPRESENTATION
- Don’t say you did what you didn’t. Greycas
  - Disclosure of relationship
- Expecting others to do their work. Greyhound (π barred by comp. negl. b/c its negl’ce exceeded Δ’s)
- Privity – Generally a lawyer is liable for negligence only to those in privity-of-k with him
- Rest. 2d Torts § 73 – 3 Exceptions: 1) inviting reliance of non-clients; 2) non-client enforcing duty to client; and 3) breach of fiduciary duty
- Intentional torts – No privilege to commit intent’l torts against 3d persons exc. defamation for litigation
- Fraud & Misrep – 1) lawyer intended to deceive (recklessness ok); and 2) π was in class lawyer could foresee being affected
- Does lawyer know? Worldwide Marine Trading (lawyer must have done more than merely advise)

HELPING A CRIME
- Hazard 3-prong test: 1) client engaged in conduct violating crim. law or civil oblig; 2) Atty has knowledge of facts to know it’s a violatin; 3) Atty facilitates with advice or prevent detection or furthers conduct

SECURITIES AND REGULATORY LAW
- Opinion Letters – 2.3 – Is eval. compatible with other duties; and doesclient consent after consultation?
- Learned info → confidential 2.3b – Except as disclosure req’d in connection with report
  - See 1.6 – still protects info.
- 2.5, cmt 5 – Limiting terms of evaluation, excluding categories

SECURITIES AND REGULATORY LAW (cont’d)
- 4.1 – Truth in statements to others → no knowing misstatements of fact/law; or fail to disclose to avoid assisting crime/fraud unless protected by 1.6
- “Knowingly” defined as actual knowledge of fact in question
- Aiding & Abetting – Nat’l Sec. Marketing Corp. – lawyers face aiding & abetting charges for not divulging accountant concerns
- 1.13b – If lawyer knows employee of org is engaged in violation of law likely to cause injury → proceed in best interst of org
  - Reconsideration, separate legal opinion, higher authority.
- Principal liability → Active role in enterprise – Lawyers taking active role in enterprise may be liable w/o intent (Benjamin)
  - Mere advisors → not subject to liability as principals
- Secondary → SLUSA limits liability
- Culpable intent – Barker – must have knowledge of facts
- Legal opinion facilitating – Nat’l Stud. Mktg → lawyer must take preventative action when he issues a legal opinoin → facilitating sale of securities & clients made false representations

MALPRACTICE
- Elements – Duty, breach, cause, harm
  - Duty – Was there a relationship? Purpose to benefit π?
  - Break – Look at knowledge, skill, prudence, diligence
  - Cause – Cause-in-fact, proximate harm
  - Harm – Legally cognizable? Econ harm usual
- Confusing state of law – Lucas – Rule against Perpetutities case
- Non-clients – Privity? - Will (See Lorraine) – Adoption (Metzker)
- Causation –Can client show underlying case would have succeeded? Smith dissent.
- Settlements – Majority – Settlements protected by finality; minority – may get to jury with right allegations
- Ordinary practitioner standard – Local custom may not fly (Gelason)
- Expert testimony – 1) level of care owed; 2) failure to conform
- So obvious – Matter of common knowledge? (Wagenmann)
- Referring the case – Home – tax shelter case
- Rules not basis for cause of action – MCPR Prelim Stmt ¶ 18
  - Admissible and relevant evidence
- Limiting Liability – No prospective limitation – 1.8(h); In re Tallon
- Insurance exclusions: 1) crime; 2) dishonesty/fraud; 3) punitives
- Partnerships – Atty’s at risk: 1) negl’t atty; 2) supervisory partner

CONFIDENTIALITY
- Rest. § 118 – Comm’n b/w privileged persons in confidence for the purpose of obtain’g or providing legal svcs to client. (p 14)
- 3d party present – Priv. Destroyed (Amer. Air)
- Joint clients – 2.2a1 – Atty acting as intermediary → must consult with each client re: effect on atty-client privilege
- 5 Exceptions: 1) decedent’s disp. of prop.; 2) client crime/fraud; 3) trustee or other fid. charged w/ breach of fid. duty; 4) Disp. B/w representatives of org’l client and constituents (Gamer)
- Corporate Priv – Subject-matter test (Upjohn); Rest. § 123 Need to know test
- Change in mgmt – Successor mgmt can waive privilege
CONFIDENTIALITY (cont’d)

- Advising against speaking to other counsel –
  - 4.2 – No comm’n re subject of rep’n w/ person lawyer
    knows to be rep’re’d
  - 3.4f – Don’t ask not to speak unless relative/emp and
    person’s interests not adversely affected
- Gov’t clients – Priv. Given narrower reading? (WOLFRAM)

WORK PRODUCT

- FRCP 26b3 – To disclose w/p 1) substantial need; 2) hardship
  - Att’y’s mental impressions still protected
    ▪ Majority (Upjohn) – w/O extreme necessity → not disc’ble
    ▪ Minority – (La & Minn) – Never discoverable
- “Anticipated litigation” – Ins. context – Maj. Rule: Att’y has
  become involved: 1) prepare doc’s or 2) requested prep
  - Minority rule – All ins. investigates treated as in anticipation
  - No crime/fraud
- Who may invoke? Majority (Rest. § 139) – Client;
  - Minority: Lawyer & Client; Few cts: Atty can resist
- Accountants – W/P not protected – Arthur Young
  - IRS Rule § 7525 – Extends some protection of confid’ty

PROFESSIONAL DUTY OF CONFIDENTIALITY

- MRPC 1.6 – Don’t reveal unless 1) client consults after consult;
  or 2) att’y believes necessary to prevent crime → death/sub.
  Harm; or 3) claim or defense of lawyer
- Policy – See 1.6, cmts 4, 5
- Publicly available info. – No matter – Cf. 1.9c2
  - Former client → can use – MRPC 1.9c1 “generally known”
- Client counsel/imp’d authority – 1.6a, and cmt 7
- Breaching Consequences – Pressley – Mother informed lawyer
  that she suspected husband was abusing daughter – disciplined
- Self-Defense Exception – 3 categories: 1) client charges atty
  with wrongdoing; 2) lawyer sues client for duty owed; 3) 3d party
  accuses lawyer of wrongdoing (see 1.6, cmt 18 – no formal
  action necessary) – Myerhofer
  client is violating legal obligation to client or law imputable;
  1.6b2, cmt 18 – lawyer should advise client of 3d party
  assertions and request that client respond
- Self-defense & A/C Priv – Myerhofer extends to priv

CLIENT FRAUD

- Current fraud – 1.6 – Only 3 exceptions: 1. homicide/injry; 2.
  self-defense; and 3. implied authority
- Noisy withdrawal – 1.6, cmt 16 – lawyer may give notice of w/d
- Rest app. – Rest. § 117B(1) preventing; 117B(2) Rectifying past
- Closing your eyes – Klein (Drinker firm) – Didn’t do what he could
- Simply scrivener – Schatz (lawyer not liable if just scrivener)
- Facilitating – 4.1, truth to others; cmt 1 (atty incorporates lies)

DUTY TO COURT

- Perjury – Crary: sex w/ client → deposition lie → disbarred
- False evid – 3.3a Candor toward tribunal
  - 3.3a1 – false stmt to court
  - 3.3a4 – false evidence – lawyer must remedy if discovers
  - 3.3b – candor to court trumps confidentiality
  - 3.3c – discretion to refuse to offer evidence believed false
  - 3.3d, cmt 15 – Tell judge ex parte of all material facts
- Criminal penalties – Suborning perjury (18 USC § 1621); false
docs (18 USC § 1001, Lopez)
- Perjury – 1) willful; 2) material?
- Who? – MRPC duty not to offer false evid. limited to offering atty

LAWYER-CLIENT RELATIONSHIP

- Forming rel’p – Togstad: Reas’ble for client to think she had atty
- Prospective client – Interaction may invoke duties
- Limiting duties – 1.2c and cmt 4 – lawyer may limit objectives
  - 1.2, cmt 5 – Limitation cant violate 1.1
- Choice of client – 6.2, cmt 1 – Lawyer not obligated to accept
  client whose char lawyer deems repugnant
- Mandatory Withdrawal – 1.16a: 1) violate Rules; 2) lawyer’s
  ph’/mental condition impaired; 3) lawyer discharged
  - Participation in crime/fraud - 1.2d
  - Requiring disclosure of fraud – 1.6b
  - Fraud on court 3.3, 2.3, 4.1
- Permissive withdrawal: 1.16b: 1) client persists in what lawyer
  thinks is crime/fraud; 2) lawyers serv → fraud; 3) pursuing
  imprudent/repugnant objective
  - Judge’s discretion – 1.16c
- Protect client after w/d – 1.16d – notice; time for new aty; give
  papers/prop; refund fees
- Lawyer’s file – Sage Realty – Client presumptively entitled to
  complete file, except for internal firm documents
- Client’s right to discharge – Any time w/ or w/o good cause
  - Litigated proceeding – Tribunal authority
  - Eve of trial – Leave unlikely to be given
- No prospective waiver – Client can’t waive this right
- Prospective fee agmt ok – Enforceable
- Quantum meruit – Standard basis of recovery

Mr. Alberts (A ’02)
CONFLICTS OF INTEREST

- MRPC provisions: 1.7–1.15, 2.2, 2.3, 1.16, 2.1
- Directly adverse – 1.7a – Not allowed unless 1) res’le belief of no adversity; and 2) each client consents after consult.
  - 1.7, cmt 7 – Advocate against client
- Responsibilities to other clients – 1.7b – Not allowed if materially adverse, unless 1) res’le belief; 2) client consents
- Lawyer’s own interests – 1.8 – series of situations
- Lawyer as intermediary – 2.2
- Concurrent Rep’n: Westinghouse (clients submitted info w/ reasonable belief in atty’s & K&E not allowed)
- Antagonistic positions – 1.7, cmt 9 – Ok unless appellate level
- Who qualifies as client? – MRPC 2.2, cmt 6
- Advance Waivers of Conflict – ABA Opin. – clarity so client’s consent can be viewed as informed; But see In re Boone
- Firm Proc. to discover conflicts – 1.7, cmt 1
- Defining a firm: 1.10(a), Office space: 1.10, cmt 1
- Related Lawyers – 1.8i: Not in dir. adversity unless consent & consultation; Dating – 1.7a – Same result (See Jackson)
- Limiting effect – Fianada – Disqualifying only re: remedy phase
- Curing conflict – Picker Int’l – Merged firm → no cure by simply dropping one client. Should have w/d from lit. prior to merger
- Using disqualified lawyers work – Tainted evid. excluded (First Wisc. Mortgage Trust)
- Transactional Context – Must have full disclosure (Callahan)
  - 1.7b2 – Consultation should expl. implications and advantages/risks involved
- “Informed consent” – Rest. § 202, ctm 1 – lists factors
- Full disclosure – 2.2, cmt 6 – Lawyer still req’d to keep each client adequately informed & maintain confidentiality.
  - A v. B (NJ 1999) – Firm representing husband and wife in drafting wills had discretion to tell wife re bastard child.
- Buyer & Seller – Banta (atty conveyed inaccurate facts)
- Lawyer as Intermediary – 2.2
  - 2.2a1 - Issues atty should discuss w/ clients
  - 2.2a2, a3 – Atty’s belief → clients’ best interests; each client → informed decision; no material prejudice; possible for impartiality in common re’n
  - 2.2b – how lawyer should proceed
  - 2.2c – Withdrawal → Atty cant represent either post-fall out
- Matrimonial matters – See 5 factors on p 32
- Insured/Insurer – See MRPC 1.8f – Atty can’t accept $$ from another unless: 1) client consent+consult; 2) no interference w/ indep; 3) confidentiality (1.6) maintained
  - 1.8b – No use of info. re rep’n of client to his disadvantage w/o consent/consult
  - Duty-to-Settle doctrine – Crisci

Successive Conflicts
- 1.9a – Cant represent former client in substantially related matter → unless client consents (no consult req’d)
- Duty of confidentiality – 1.9c → continues even w/ consent
- Former Government lawyer – 1.11 → firm not diq’d 1.11b

Loyalty
- Brennan’s case – No attacking own work
- Rest. § 213 – No switching sides if 1) atty acquired confidential info; or 2) involves lawyer’s previous work
- Equal loyalty to both – Cf. MRPC 2.2, cmt 7

MRPC 2.2 - Can’t represent either if suit is subject matter of intermediation
- Previous agmt – Rest. § 201, ctm d (clients can agree at outset that atty will follow one of them if fall out)

Substantially related – In re Amer Airlines – 2 questions
- Involve use of confidential info?
- Specific subject matters, issues, causes common to prior and present litigation?

Competitors ok – Atty can represent two clients whose interests are generally adverse, i.e. not in lit txn. 1.7, cmt 3

Taint Shopping – See MRPC “Scope” – Relationship doesn’t exist until client asks lawyer to “render service” and atty agrees
  - Some duties, e.g. confidentiality, attach anyway

PROFESSIONAL DISCIPLINE

- Squeal Rule – 8.3 – Must report only report those violations raising question of atty’s honesty, trustworthiness, or finteess;
  - 8.3c – Lawyer doesn’t have to report if knowledge protected by confidentiality
  - In re Himmel – Ct. found info wasn’t privileged
- Threatening complaint – ABA Op. 94-383 → no

Subordinate Lawyers – Safe harbor 5.2b, unless clearly wrong

Obligation to supervise – 5.1b – Reasonable efforts to ensure compliance

Liability on partner – 5.1c if: 1) orders/knowledg; 2) knows but fails to avoid/mitigate when remedial action is possible
  - See also 8.4a – Prof misconduct to knowingly assist/induce

Partner makes judgment call – 5.2 – “arguable question”

No safe harbor – Murphy & Demory – no reasonable resolution of arguable question of prof duty.

Conflicts screening procedures – 5.1a
  - Depends on firm – 5.1, cmt 2

S. Agrawal