Chapter IV Financing Legal Services

A. The Role of the Marketplace

Brobeck Phleger & Harrison v. Telex Corp

Facts: Telex engaged Brobeck as "the best available lawyer" to file petition for certiorari after the Tenth Circuit reversed its favorable $259.5 million judgement, and affirmed a $18.5 million counterclaim.

Brobeck was hired on a mixed contingency basis, with the final line saying that the contingency fee would be not less than $1 million.

When it became clear that the Supreme Court was about to decide the case, the parties settled. Brobeck sent a bill for $1 million. Telex claims the fee is excessive, will not pay. Brobeck sues for the fee.

Held: The contract for the fee was not "so unconscionable that 'no man in his senses and not under a delusion would make on the one hand, and as no honest and fair man would accept on the other.'"

Although the minimum fee was very high, the filing of the petition did give Telex the leverage to push settlement.

Action: Fee upheld.

Jones v. Amalgamated Warbasse Houses

Facts: Counsel represented minority persons who were denied publicly subsidized housing. Defendant settled, and agreed to pay attorney's fees, which came to about $129/hour.

The district court, **on its own**, reduced the amount which defendant should pay plaintiff's counsel to about $75/hour. Defendant had not applied for this, and since the relief settled on was only injunctive, this did not increase the plaintiff's award.

Held: Second Circuit said that it was proper to review fee settlements, and that while "a presumption of regularity [should be afforded, it may be overcome when there is good reason, such as] public perception of appropriateness of fees, and the range of awards allowed in similar cases."

Action: Upheld on appeal.

B. Unethical Fees

Rule 1.5

DR 2-106

Bushman v. State Bar of California

Facts: Bushman was representing Cox. Bushman insisted on $5,000 retainer because opposing counsel Chern typically generated "a paper war," plus $60/hour fee.

The case was resolved by stipulation of the parties. Chern charged a total of $300 plus costs. Bushman, on the other hand, claimed he spent 100 hours on the case, but would only charge $2,800 plus costs.

Held: Fee was excessive, exorbitant, unconscionable. Only routine matters were taken care of by Bushman. Bushman failed to substantiate his claim of 100 hours. The court noted that opposing counsel spent less than six hours on the case.

Ordered: One year suspension from practice of law.

Note cases: (110-111)

Attorney Grievance Commn. of Maryland v. Korotki

Held: Contingency rate increased form one third to three quarters after retainer warrants suspension.

[After retainer, client is presumed to have less bargaining power]

Rule 1.8(a)

Rosquist v. Soo Line R.R.

Held: Even where fee is arranged before retainer, and where the fee contract is not challenged by the parties, court may appraise the fee for conformance with the reasonable standard of the Code of Ethics.

Proc: Limited later by United States v. Vague.

United States v. Vague

Facts: Judge ordered return of fees (already paid) which he considered, on his own, unreasonable. Lawyer refused, and judge held him in civil contempt.

Held: Misuse of contempt power because there was no threat to the authority of the courts.

Rosquist distinguished because this was just between the lawyer and the judge, not a party.

Proc: Distinguished by United States v. Strawser.

United States v. Strawser

Facts: Lawyer hired to represent defendant, $47,000 fee. Defendant lost on trial, wants lawyer to represent him on appeal. Lawyer asked for more money, so defendant asked court to supply appellate counsel, which prompted a hearing.

Held: Fee too much.

Vague inapplicable because in Vague, judge unnecessarily jumped in, but here, trial judge needed to resolve fee issue to determine whether lawyer was required to continue

representing defendant.

E.C. 2-19
Rule 1.5 (b), (c)

C. Contingent Fee and Statutory Limits

Intro notes: (112-113)

Can be all contingency or mixed.
Can be based on contingency other than winning a case.
Gives lawyer interest in case, but okay.
Rule 1.8(j)
DR 5-103(A)
Should give option of traditional fee arrangement.
Rule 1.8(e)
DR 5-103(B)
McKenzie Construction, Inc. v. Maynard: contingency fee yielding 13x usual hourly rate is okay.
Florida's version of Rule 1.5 requires that lawyer to inform clients as to right to bargain.

STATUTORY FEE CEILINGS (114-117)

Roa v. Lodi Medical Group
Facts: Statutory fee schedule for malpractice cases was 40% of first 50,000, 33% of next 50,000, etc., sliding down.
Held: 1. Does not infringe in right to counsel.
2. Not thus impossible for victim to retain counsel.
3. It does make the interests of the client and the attorney diverge, but does not create an actual conflict.

Fineberg v. Harney & Moore
Held: Client may not waive statutory limits on fee.

Walters v. National Assoc. of Radiation Survivors
Held: (Law upheld) - when representing veteran against Veteran's Administration for death or disability related matter, may only receive fee of $10.

Matthews v. Eldrige (cited by Walters)
Held: [In considering a fee limiting statute] A court should consider the private interest that will be affected by the official action, the risk of erroneous deprivation of the interest, the probable value of procedural safeguards, and the government's value in adhering to the present system.

United States Dept. of Labor v. Triplett

Facts: Lawyers get their fees for representing particular coal miners from the agency or court (by statute). The Dept. of Labor rule allows fees "reasonably commensurate with the necessary work done." Triplett charged 25% recovery.
Lwr Ct: Limitation on counsel fees unconstitutional.
S.Ct.: Supreme Court overturned, saying that there was no evidence that the victims of Black Lung were unable to retain counsel, or that the cause of such inability is due to the fee system.

PROHIBITIONS IN CRIMINAL AND MATRIMONIAL CASES (117-119)

DR 2-106(C)
EC 2-20
Rule 1.5(d)

Reasons (Matrimonial):
1. State interest in leaving money with family
2. Since court can order fee shifting, less wealthy spouse does not need such incentive for counsel.
3. Conflict of interest, e.g, as against reconciliation

Reasons (Criminal):
1. Encourage wrong plea bargain, if fee is contingent on acquittal
2. Interest in a particular dispositions may encourage improper behavior in a lawyer

D. Minimum Fee Schedules

Goldfarb v. Virginia State Bar
Facts: Petitioners were buying a house. This required a title examination. Petitioners asked one lawyer for a price, and received a quoted minimum fee from the State Bar fee schedule. They then tired to get a lawyer to beat the fee. No lawyer they contacted would. Petitioners brought this action against the State Bar for price fixing, violation of the Sherman Act.
Questions: 1. Was there price fixing?
2. Was this interstate commerce?
3. Is this exempt form Sherman Act as a "learned profession?
4. Is this state action, and therefore exempt from Sherman Act (Parker v. Brown)?
Held: 1. Fee schedule is not purely advisory. After all, everyone adhered to it without asking any more questions. Further, there could be professional discipline for violation. (YES)
2. [was interstate commerce] (YES)
3. No explicit exemption for "learned professions".

Lawyers cannot adopt anti-competitive practices with impunity. (NO)

4. State Bar is a state agency by law. The question is whether this action was required by the State acting as sovereign. The State did not require this. The anti-competition activities would have to be compelled by the State to be exceptional. (NO)

ANTITRUST AND LEGAL ETHICS

FTC v. Superior Court Trial Lawyers
Facts: Lawyers boycotted, refusing to represent indigent clients unless given a raise.
Held: Boycott not politically motivated, but economically, so not protected by 1st Amend.

Bates v. State Bar of Arizona
Held: Arizona's prohibition on legal services advertising does not violate Sherman Act, because it was state action (affirmative command of the Arizona Supreme Court).

Hoover v. Ronwin
Facts: Applicant failed the bar, claimed the pass rate was decided not on competence but on desirable number of practicing lawyers.
Held: Action was determined by Arizona Supreme Court, state action, therefore exempted.

E. Court Awarded Fees

1. Determination of Amount

City of Riverside v. Rivera
Facts: Police broke up party with allegedly unnecessary force. π's sued for violation of civil rights and won ($33,350). π's also sued for attorney's fees ($245,456.25 based on hourly rate) under §1988. Δ contends the fee award should be proportionate to the damage award.
Issue: Is an award of attorney's fees under 42 USC 1988 "unreasonable" if it exceeds the damage award?
Held: 1. Hensley v. Eckerhart suggested a lodestar method for attorney's fees under §1988 - hourly rate times hours, as long as hours were reasonably expended. Other factors which can be considered include results obtained (good or bad).

2. The fee statute (§1988) is designed to give incentive to take these cases. Civil rights cases involve vindication of many nonpecuniary rights, including national interests, so the fee award need not be proportionate to the damages alone.

3. The hours were reasonably spent.

Dissent (Burger): Nonsense - these attorneys had just graduated when they started this suit. Too much.
Dissent (Rehnquist): The hours were no reasonably spent [analysis of hours p.136-137]. Only a few of the claims succeeded. In any case, reasonableness of a fee depends on the amount of the recovery, unless, for e.g., bad faith conduct of opposition, or identifiable benefit for third parties.

Pennsylvania v .Delaware Valley Citizens Council (p. 140)
Held: An increase in a fee award due to risk of non-recovery should only be done in exceptional cases, that without such enhancement, π would have had trouble getting council.

Blanchard v. Bergeron
Held: While §1988 does not put a ceiling on reasonable council fees, it cannot be used to invalidate a contingent fee arrangement which yields a greater amount than would have been awarded under §1988.

2. Settlement Conditioned on Fee Waiver
Evans v. Jeff D.
Issue: Must statutory authorized fees be assessed under the Civil Rights Attorney's Fees Awards Act, or may π waive?
Facts: Attorney working for civil rights case accepts settlement in which fees are waived by π.
Held: Fee waivers are not per se prohibited. If it were, many π's could not settle. However, π should reasonably get something for this waiver.
Dissent (Brennan): This makes things harder on π's to get relief. Just because Congress did not mention fee waivers does not mean they are okay. The majority asked if fee waivers were "inconsistent" with the Fees Act. They should have asked if it "furthered" the purpose of the Fees Act (access to council). π's have no interest in the fees since they can't pay them anyway. If waivers are permitted, they will always be requested in any settlement. Bottom line - no lawyers for these π's.

F. Mandatory Pro Bono Plans

David Luban, Lawyers and Justice: An Ethical Study
Arguments about pro bono
Con: Its redistributive, and should be taken care of through taxation.
Pro: Community cannot afford to pay for the pro bono.
Con: Lawyers "cut up and disposed of" by public needs.
Pro: Not a threat to a lawyers integrity - just a little sacrifice.
Con: If community cannot afford it, it should not be offered.
Pro: Lawyers are licensed - its part of the license.

Con: Nobody else is licensed (e.g. grocers) and asked to give away free services (e.g. food).
Pro: Lawyer is unique-cannot exist without state participation in professionalized adversary system. Further, lawyer benefits from unique monopoly.

Finally, lawyer is unique in that when the poor lacks it, it is uniquely hurt. When a rich person gets a lawyer, the rich person gains advantage over everyone else. When a rich person gets food, that's all she gets.

G. Syndicating Lawsuits

Idea: Sell shares in the possible award from a suit, and use that money to fund the actual litigation. Cases are split.

Killian v. Millard
Held: Syndication agreement okay.

Refac International v. Lotus Development Corp.
Facts: π acquired 5% interest in a patent in exchange for a promise to sue infringers and fund the litigation.
Held: π was not real party in interest, so this was a violation of New York champerty law.

H. Who Gets the Money?

Within a Firm
Partners split revenues and make money from associate time.

Division of Fees Outside Firms
Code DR 2-107(A) requires that lawyers not together in a firm receive fees in proportion to the work done.
Model Rules Rule 1.5(e) allows the split to be according to the services performed by each lawyer.

In any case, client must know.

In re "Agent Orange" PL Litigation
Facts: Lawyer needed cash to pursue claims. Six other attorneys put up $200,000 each, for $600,000 in return, the remaining split according to work done.
Held: Distribution of fees must be somehow related to work done. Also, beware of conflict of interest in class actions. The test: when the fee agreement is made, will the class be hurt by the fact that counsel will be paid by some method other than work done?

Chapter XVIMarketing Legal Services

A. Defining the Borders: Bates and Ohralik

Bates v. State Bar of Arizona
Facts: **Ad published** by law firm advertising reasonable fees, some specific fees for specific services. Arizona forbade legal advertising.
Argument: Arizona had these claims: 1) ads encourage commercialism, 2) are inherently misleading, 3) stir up litigation, 4) increase cost of representation, 5) encourage bad legal work, 6) difficult to monitor against abuse.
Held: All claims rejected, as this is protected free commercial speech. States may, however, prohibit false or misleading ads.

Ohralik v. Ohio State Bar Assn.
Facts: Lawyer heard that acquaintance had car accident. Lawyer **visited victim in hospital and at home**, offered his services, and got them to sign a contract for representation. Lawyer also visited injured passenger and solicited her as well (successfully). Clients wish to repudiate counsel.
Held: States may prohibit in person solicitation (DR 2-103(A), 104(A). Solicitation often requires immediate response, places pressure on client, unlike ads. Further, there is no chance to have a Bar review the statements being made, as there may be for ads. The State may make such rules even merely as prophylactic measures.

B. Defining the Center: *Zauderer*, *Shapero*, and *Peel*

1. Targeted Advertisements

Zauderer v. Office of Disciplinary Counsel
Facts: Lawyer placed ad, targeted for users of the Dalkon Shield IUD.
Claim:
1. DR 2-101(B) (requires that ads be dignified, no pictures),
2. DR 2-103(A) (recommending employment of himself as a lawyer),
3. DR 2-104(A) (accepting employment after giving unsolicited advice).
4. DR 2-101(B)(15) (ad which mentions contingent fees must state whether court costs are deducted)

Rule: Commercial speech which is not false or misleading and does not concern illegal activities may be restricted only for a substantial state interest.

Held: 1. Nothing wrong with self-recommendation.
2. Nothing wrong with a targeted ad.
3. This will not stir up litigation.
4. A prophylactic is not needed, as these ads are no worse than those for other professions, and undignified behavior is not so likely to happen as to require one.
5. Nothing per se wrong with pictures. They get the same commercial speech protections.
* 6. The **State may require** that the manner of charging the court costs must be disclosed. Disclosure requirements are not unconstitutional "as long as [they] are reasonably related to the State's interest in preventing deception of consumers."

Dissent (O'Connor): Legal services are much more complex than other services, and a rule preventing lawyers from accepting clients after giving them unsolicited advice would properly protect clients by preventing pressure from eager lawyers.

2. Targeted Mail

Shapero v. Kentucky Bar Assn.

Facts: Lawyer sent letter to house owners who he knew were being foreclosed, saying that he knew so and might be able to help.

Issues: May the state prohibit sending truth non-deceptive letters to potential clients known to face particular problems?

Test: "The relevant inquiry is not whether there exist potential clients whose "condition" makes them susceptible to undue influence, but whether the mode of communication poses a serious danger that lawyers will exploit any such susceptibility."

Held: 1. This is not like in person solicitation. Just like an ad, it can be put aside and forgotten about.
2. No evidence that this will be any harder to monitor than ads, so no prophylactic is merited.
3. No matter how big the type is, and how much the letter speculates, it cannot be the same as a lawyer standing before you.

Dissent (O'Connor): Being a lawyer means tempering your "selfish pursuit of economic success by adhering to standards" that do not apply to other professions. Because they are given unique license to the esoteric, they must maintain a special arms-length distance. Zauderer was wrong, so this should be wrong too. Personalized letters can put much pressure on the receiver.

3. Claims of Special Expertise

Peel v. Attorney Registration and Disc. Comm'n of Ill

Facts: Peel held himself as certified by the National Board of Trial

Advocacy, a private organization (normally a state function).
Held: Since this is not misleading or false, nothing wrong.
Concur (Marshall): State might require that lawyer make it clear that the certification organization is a private one.

C. Defining the Methodology (821-824)
This section is discussion of the previously discussed decisions, compares and asks questions.

D. Defining the Rules (824-829)

Radio and Television - Protected?
Some states limit television and radio ads beyond generic messages (no music, no dramatizations). The Supreme Court has not explicitly extended the protection given written ads.

Can the State Require Disclaimers?
Note that Zauderer lost on the disclaimer issue, for failing to state that clients would be liable for costs. Marshall said state might require disclaimers for accreditation. The Supreme Court seems to favor requirements which add to the information disseminated.

Can Legal Ads Carry Endorsements?
CA used to prohibit this, but changed their rule. New York allows the use of client testimonials.

E. Solicitation by Public Interest and Class Action Lawyers

In re Primus
Facts: Primus (ACLU lawyer) learned that pregnant women on Medicaid were being threatened with sterilization. Primus went to speak to a group of women. Mary Etta Williams, who had been sterilized, was present. The ACLU told Primus they were going to fund suits, so Primus wrote Williams. Williams' doctor required a release from liability, so Williams told Primus she was not going to sue.
Claim: Primus was reprimanded for the letter under DR 2-103(D)(5)(a),(c) (client solicitation by non-profit organization allowed only if purpose is not rendition of legal services) and DR 2-103(A)(5) (prohibiting lawyer from seeking employment from whom they have given unsolicited advice).
Case: NAACP v. Button held that NAACP was free to express itself and associate without it being considered improper solicitation. Later decisions upheld this protection of "associational freedoms".
Held: ACLU, like NAACP, uses its funds to assist in litigation, but only where "substantial civil liberty questions are involved." Litigation is,

for ACLU, "a form of political expression." Primus would not have even gotten any money from the suit. The actions here benefit from the protection of associational freedoms, so to curtail them, a **state must show a compelling interest and that the means are closely drawn** to avoid unnecessary infringement.

Ohralik held not to apply; for political association, state must exercise greater precision in prophylactic measures.

Dissent (Rehnquist): There is no principled distinction here. Ohralik could have said he "associating politically" too. The behavior, not the characterization of the behavior, should be scrutinized. Button works for organizations, but for lawyers?

Communication with Class Members

Gulf Oil Co. V. Bernard

Held: The court may not per se restrict communications between representing counsel and potential class members.

Kleiner v. First Nat. Bank of Atlanta

Facts: Court ordered defense counsel not to contact potential class members for a certain period while they decided whether or not to be part of the class. Relying on Gulf Oil, they did anyway, and many potential members did opt out. Defense and counsel were fined.

Held: The court's order was narrowly drawn to avoid infringing on 1st amendment speech. This order was not prohibited; fines upheld.

Conflicts of Interest

I. Concurrent Conflicts of Interest—Chapter 5

Ethical rules that seek to prevent concurrent conflicts primarily seek to ensure attorney loyalty, whereas protection of confidences is the dominant goal of successive conflict rules.

Concurrent Conflicts: the lawyer has his loyalties divided between two or more clients (e.g., lawyer representing co-defendants in a case may find that each wants to point the finger at the other, lawyer representing two parties wishing to enter into a contract may find that he can't draft a clause one way or another without disadvantaging one client or the other—see other examples Gillers at 179); the lawyer has personal interests at odds with those of your client.

See EC 5-1; Rule 1.7 cmmt.

Successive Conflicts: Hypo: a lawyer represents A in defending a patent; later the lawyer represents B in suing A on the ground that the patent is no good. Loyalty—Does the lawyer's duty of loyalty to A continue after the representation? While the Code does not take an explicit position on loyalty with successive conflicts, the Rules contemplate that the duty of loyalty survives the end of the relationship. See Rule 1.9 & cmmt "Adverse Positions". Client Confidences—The lawyer will have likely gained confidential information during the representation of A; if the lawyer reveals this information on B's behalf he may violate DR-401 and Rule 1.6(c).

See generally Rule 1.6.

Related Issue: If it is concluded that a lawyer is disqualified from representing a client because of a concurrent or successive conflict, should a lawyer with whom the first lawyer is affiliated be permitted to accept the representation? Regarding imputed or vicarious disqualification see DR 5-101(B), 5-102, & 5-105(D); Rules 1.9, 1.10, 1.11, 1.12, and 3.7.

What happens if an attorney is caught in a conflict? (1) Discipline (although ethics boards recognize that the technical nature of conflicts makes them inappropriate candidates for discipline); (2) Disqualification; (3) Rule 11 sanctions; (4) Malpractice liability.

A. Attorney-Client Conflicts

1. Business Interests

Goldman v. Kane (Mass Ap. Ct. 1975)
Atty lends client, a graduated law student, $30 k (used to p urchase a boat) secured by mortgage in exchange for certain real and personal property and a promise to repay. Atty sells the property for $50 k and repossesses the boat upon default.
Held: "The law looks with great disfavor upon an attorney who has business dealings with his client which result in gains to the attorney at the expense of his client." When an atty bargains with a client in a business trans., and the trans. is later called into question, the Ct will subject it to close scrutiny—the atty must show:

(1) that the trans. was in all respects fairly and equitably conducted;
(2) that the Atty fully and faithfully discharged all his duties to his client, not only by refraining from misrepresentation, but by active diligence in seeing that the client was fully informed of the nature and effect of the trans. and the client's own rights and interests in the subject matter involved; and
(3) that the Atty saw to it that the client either received independent advice in the matter or that the Atty gave the client such advice as the Atty would have given the client had the client entered into the trans. with a stranger.

Justification: By requiring the client to get independent advice or its virtual equivalent when an Atty deals with a client in a business trans to the atty's advantage the presumed influence of the Atty-client relationship has been neutralized.

A Lawyers Financial Interest

Deals with Clients

See Rule 1.8(a) & DR 5-104(A).

Rule 1.8(a)(2) prohibits certain transactions between a lawyer and a client unless the client

is “given a reasonable opportunity to seek the advice of independent counsel,” but does not require that the lawyer advise the client to seek independent counsel (however, the cmmt says that it is “often advisable”). Rule 1.8 & DR 5-104(A) do not apply to deals between lawyers and individuals other than clients unless there is some kind of fiduciary relation between the parties. Cf. In re Imming (Ill. 1989) (Held—A lawyer who enters into a business deal is bound to observe the general dictates of the ethics code even though the atty is not acting as a lawyer at the time).

A transaction between Atty and client will be scrutinized much closer if it was entered into after an Atty-client relationship was established.
Rat’l: After payment of a retainer to the atty, the client and the atty have a fiduciary relationship, therefore, the client will probably expect that the atty will be defending the client’s interests; also, the atty may have had access to client confidences. Most courts would not perceive this transaction as being arm’s length.

KMA Associates (Fla. 1985)
Held—Atty had to prove by clear and convincing evidence that the entire agreement between atty and client was fair. All doubts would be resolved in favor of the client.

Pollock (Mass. 1984)
Held—Ct declined to require an Atty to suggest independent counsel in every case, however, it did recognize the value of independent counsel in rebutting any presumption of undue influence.

Abrams (NY. 1st Dept. 1979)
Held: Law firm could not sue on an agreement entered into with a client unless the firm could “establish absence of fraud . . . and that all terms were fully understood by the client.”

Interests Adverse to Clients:

There are also limits on the lawyer's financial interests with others if they could compromise the lawyer's loyalty to clients.

> Rule 1.8(a) forbids a lawyer to knowingly "acquire an ownership, possessory, security or other pecuniary interest adverse to a client."

2. Media Rights

> Rule 1.8(d) & DR 5-104(B) forbid lawyers to acquire publicity rights to a story based on the subject of a representation before the conclusion of the representation.
>
> What if criminal defendant assigns the rights to his story to a lawyer before the conclusion of the representation and is later convicted?
> Two focuses: (1) The convicted defendant may seek to vacate the judgment alleging that the assignment created an impermissible conflict of interest. However, the defendant must prove that the conflict was not only possible but actual (difficult burden). (2) The lawyer is subject to discipline regardless of whether the conflict was actual or merely possible.
>
> Maxwell (Cal. 1982)
> Held—A criminal defendant has a due process right to promise counsel media rights to the defendant's story id the defendant knowingly waives the consequent potential conflict. Beware of this case's holding as it may have been undercut by later US SCt cases construing the 6A Right to Counsel.
>
> NY Opinion 606 (1990)
> Held—A prosecutor could not sell the rights to her story prior to the conclusion of the case because of possible conflicts of interest between the lawyer's greed and her undivided loyalty to the client. The potential conflict disappears after the case.
> Criticism: In a celebrated case, it is possible that the lawyer's decisions during the trial may be influenced by the promise of financial remuneration at the end.

3. Financial Assistance and Proprietary Interests

DR-103(B): Atty may advance the costs of litigation and related expenses so long as the client remains ultimately liable for them.

Rule 1.8(e): Atty may advance the costs of litigation and related expenses and make repayment of those expenses contingent on the outcome of the matter, or do away with repayment entirely if the client is indigent.

Neither 103(B) nor 1.8(e) permit the Atty to advance any money other than court costs or expenses of litigation (i.e., no living or medical expenses).

In re Brown (Or. 1984)
Held—Atty suspended from practice under DR 103(B) for advancing $361 to client for living expenses.

Md. Atty Grievance Comm'n (Md. 1989)
Held—Atty publicly reprimanded for giving a client money to travel to a medical treatment facility. Rat'l—The rule is directed at avoiding the acquisition of an interest in litigation through financial assistance to a client. Clients should not be influenced to seek representation based on the ease with which monies can be obtained from law firms and attys.

D.C. Opinion 179 (1987)
Held—It was not unethical for an atty to acquire a partnership interest in the company that the lawyer represented in an application for a govt license because the interest would be of no value unless the govt application was approved. Therefore, it was like a contingent fee and proper so long as it was reasonable.

D.C. Opinion 195 (1988)
Held—It is unethical for an atty to accept all rights to a client's patent as security for his fee in prosecuting the patent (the rights to the patent would revert back to the client upon payment of the fee).
Rat'l—Because the client's liability here was not contingent on the success of the atty's application, the lawyer was receiving a proprietary interest in the litigation in violation of DR-103(B).

Rand v. Monsanto (7th Cir. 1991)
Held—In class actions, DR-103(B) is inconsistent with FRCP 23 and therefore DR-103 does not apply to class actions. Therefore, the class representative need not advance the rather exorbitant expenses of such litigation. Note: there is no conflict with rule 1.8(e) because that rule permits liability for expenses to remain contingent on outcome.

4. Fee–Payor Interests

Rule 1.8(f), 5.4(c) and DR-107(A)(1) permit a third party to pay for the representation of a client by the atty under certain circumstances: (1) the client must consent to the arrangement; (2) the payor must not interfere with the lawyer's independence of professional judgment or with the client-atty relationship; and (3) the lawyer must protect the client confidences. Note: Whether or not the fee payor is a client of the lawyer, the fact that the fee payor is paying for the services and the ammt paid will not likely be privileged.

Concern: This kind of triangular relationship may create conflicts between the payor and the person for whom the services are being performed.

Wood v. Georgia (U.S. 1981): Defendants were sent to jail after failing to pay the fines imposed for their conviction for distributing obscene materials. Defendant's lawyer was hired and paid by the defendant's employer.
Held—Where a constitutional right to counsel exists, 6A holds that there is a correlative right to representation that is free from conflicts of interest. If counsel's basic strategic decisions were influenced by the interests of the employer who hired him then the due process rights of defendants were violated. The Ct vacated the conviction and remanded for a determination of whether a conflict of interest actually existed.

B. Client–Client Conflicts

1. Criminal Cases–Defense Lawyers

Invalidation of Conviction

Cuyler v. Sullivan (US 1980) (Powell)

Held—The mere potential of a conflict of interest in representation is not sufficient to invalidate a conviction. A defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief (i.e., invalidate the conviction).

Rat'l—The potential for a conflict of interest exists in every multiple representation situation, so to hold that mere potential of a conflict is sufficient to invalidate a conviction would end multiple representation. Because multiple representation may do the defendant substantial good, the Ct was unwilling to endorse a rule that would virtually do away with multiple representation. Ct does not require trial cts to initiate inquiries into the propriety of multiple representations on their own (pre-FRCrim.Proc. 44).

Post Cuyler Developments:

Burger v. Kemp (US 1987)

Held—The Ct will presume prejudice only if the defendant demonstrates that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected his lawyer's performance

Disqualification of Defense Counsel

Wheat v. United States (US 1988) (Rehnquist, 5-4 decision)

Held—A DCt must be allowed substantial latitude in refusing defendant's waiver of conflicts of interests not only in those cases where an actual conflict may be demonstrated before trial, but in the more common case where a potential for conflict of interest exists that may or may

not burgeon into an actual conflict as the trial progresses. The DCt must recognize a presumption in favor of defendant's chosen counsel, but that presumption may be overcome not only by showing an actual conflict but by showing a serious potential for conflict. Effect of Decision—Prosecutors may use Wheat to disqualify a defense atty in a multiple representation where a pre-trial potential for conflict exists and the defendant has waived the potential conflict. See, e.g., Gillers at 203.

Appealability of Criminal Disqualification Orders

Pretrial orders disqualifying criminal defense counsel are not subject to immediate appeal under 28 U.S.C. §1291. Therefore, the defendant will have to proceed to trial with another lawyer (unless is otherwise available through mandamus or certified question). Flanagan v. United States (US 1984). If defendant is convicted following the disqualification of his atty, he will be able to raise the disqualification order on appeal.

Note that if a prosecutor is disqualified, the disqualification is not an issue for appeal of an acquittal of defendant. In re Grand Jury (7th Cir. 1989).

The Joint-Defense Privilege

Evidence rules often bestow a privilege on conversations between one of two clients and the lawyer for another client relating to a matter of common interest. See Proposed FRE 503(b). United States v. Schwimmer (2d Cir. 1989) (common interest rules protect communications between a client and an accountant for a co-defendant when the communication

was intended serve the joint interests of both defendants; irrelevant that no litigation was in progress).

When no joint-defense purpose is shown, the privilege will not apply. United States v. Lopez (10th Cir. 1985); Gov't of Virgin Islands (3d Cir. 1982).

Other issues: Who may waive the privilege? May one co-defendant waive the privilege for the other defendant and disclose the previously privileged communications? See discussion below

2. Criminal Cases–Prosecutors

Young v. United States (US 1987) (Brennan)
Plaintiff in a previous civil proceeding had won a TM infringement action against defendant and was awarded injunctive relief. When the defendants violated the injunction, plaintiff's counsel secured an order to show cause why the defendant should not be held in contempt of court. Plaintiff's counsel was appointed to serve as special prosecutor and later won a conviction.
Held—DCt does have the power to appoint private counsel to prosecute a criminal charge. But, counsel for a party that is a beneficiary of a ct order may not be appointed as prosecutor in a contempt action alleging a violation of that order.
Rat'l—Because the role of the criminal prosecutor is to seek justice not to convict, both federal law and professional ethics forbid prosecutors from representing the government in an action in which they, their family, or their business associates have an interest. Therefore, the prosecutor in a criminal contempt matter cannot have an interest in the order upon which the contempt is based. In this case the prosecutor was put in the position of serving two masters: justice and the plaintiff.

Lyman (NY 1990)
Held—A part-time prosecutor was censured

where he represented clients in civil matters while simultaneously investigating or prosecuting those matters criminally.

FTC v. American National Cellular (9th Cir. 1989)
FTC had obtained a restraining order against defendant that defendant had allegedly violated. The ct appointed FTC attorneys to act as special prosecutors in the ensuing contempt proceeding.
Held—The FTC, as an independent agency, was not a private party and Young was not controlling. But, the ct did note that under certain circumstances a govt atty may lack the impartiality or the appearance of impartiality that our system of justice demands of prosecutors. The fact that the FTC attys handling the prosecution were different from those that handled the underlying civil suit.

3. Civil Cases

Fiandaca v. Cunningham (1st Cir. 1987)
Held—An atty may not represent two clients when a settlement offer made to one is contrary to the interests of the other. Class counsel's duty of loyalty to the class required it to present the defendant's settlement offer to the class, to explain its costs and benefits, and to ensure that the offer received full and fair consideration by the members of the class.
Rule 1.7(b) provides: "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 . . . the lawyer reasonably believes the representation will not be adversely affected and the client consents after consultation."

Imputed Conflicts

Rule 1.10(a) and DR 5-105(D) impute conflicts among all affiliated lawyers (there are some exceptions, mainly in the area of successive representation). DR 5-105(D) imputes all conflicts without exception, but exceptions have been

made. Rule 1.10(a) exempts from imputation all the conflicts listed in Rule 1.8, except those in 1.8(c). These rules may work special hardship on legal services organizations (usually only one in a community) that represent poor and indigent clients.

Borden (DC App. 1971)
Held—A legal services organization that was representing the wife in a divorce case was appointed by the court to represent the husband in the same case. On appeal, the ct reversed the appointment on the view that it was possible for the husband to obtain outside representation and that the legal services organization was no different than a law firm. Accord ABA Informal Opinions 1418 (1978), 1233 (1972)

Standing

Issue: Who has standing to raise a conflict of interest question? Ct, client, or opposing counsel?

Original Appalachian Artwork (ND Ga. 1986): Only clients can allege a concurrent conflict of interest.

Fiandaca: Allows nonclient to allege the conflict on the theory that if an atty is violating an ethical rule the ct should know.

In re Appeal of Infotechnology (Del. 1990): The ct stated that nonclients do not ordinarily have standing to assert an opposing lawyer's conflict. But, drawing on the cmmt to Rule 1.7(a), the ct held that the nonclient would have standing only when the nonclient could demonstrate that opposing counsel's conflict somehow prejudiced nonclient's rights. The nonclient litigant does not have standing to enforce a mere technical violation of the rules. Nonclient

had the burden of showing by clear and convincing evidence that a conflict existed and that it would prejudice the fairness of the proceeding.

May a Lawyer Act Adversely to a Client on an Unrelated Matter?

Rule 1.7 cmmt: Ordinarily an atty may not do so.

Cinema 5 v. Cinerama (2d Cir. 1976): Plaintiff's lawyer was disqualified because a partner of the plaintiff was representing defendant on an unrelated matter. Held—The substantial relationship test is not a sufficiently high standard to determine whether an atty should be disqualified. Where the relationship is a continuing one, adverse representation is prima facie improper, and the atty must show that there will be no actual or apparent conflicts in loyalties or diminution in the vigor of his representation

IBM v. Levin (3d Cir. 1978): CBM represented Levin in an antitrust action against IBM while at the same time CBM (different attys) represented on various unrelated matters. CBM argued that no adverse effect to IBM would result from CBM's representation of Levin. Held—It is likely that some adverse effect on an atty's independent judgment may result from the atty's adversary posture to the client in another legal matter.

What about suing a subsidiary of an entity that you otherwise represent?

Rule 1.7 cmmt: "[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."

If the subsidiary is merely the alter ego of the parent then all bets are off (the subsidiary would be viewed as the same entity of the parent). Teradyne (ND Cal. 1991).

Appealability of Civil Disqualification Orders

An order granting or denying a motion to disqualify civil counsel is not subject to immediate appeal as of right in federal ct. Richardson-Merrell (US 1985). But, mandamus remains a possible route to review a disqualification order. (9th Cir. 1988).

Malpractice Based on Conflicts

Remedy for conflicts of interest:

1. Disqualification and remand—Fiandaca
2. Discipline—Apostle
3. Malpractice liability—Simpson

Simpson v. James (5th Cir. 1990): Attys represented both the seller and buyer in the sale of a business. When the deal fell through, atty, who had been seller's atty prior to the sale, stated that he would be unable to represent her in the impending bankruptcy (seller ultimately got nothing in the bankruptcy). See Gillers at 223 for all of the facts (2 pages of them). Held—Liability may not be premised solely on the fact that an atty represented both the buyer and the seller; after full disclosure by the atty, it may be proper in some circumstances for an atty to represent both sides in a real estate transaction. The ct affirmed, as not being unreasonable, the jury's decision to hold the atty's negligent for their acts arising out of the conflict of interest

between the buyer and the seller.

Waiving Conflicts

DR 5-105(C): Allows a lawyer to represent multiple interests otherwise disallowed by DR 105(A), (B) "if it is obvious that he can adequately represent the interest of each client and if each consents to the representation after full disclosure."

EC 5-15: In litigation, an atty should never represent multiple clients with differing interests; yet, there are a few situations where an atty would be justified in representing in litigation multiple clients with potentially differing interests.

Rule 1.7: Prohibits an atty from representing a client if:

1. the representation will be "directly adverse to another client (1.7 (a)); or
2. "the representation of that client may be materially limited by the lawyer's responsibilities to another client" (1.7 (b)).

However, in either case the atty may proceed with the representation if he reasonably believes that no representation will be adversely affected and the client consents after consultation. Rule 1.7 (a), (b).

Levine v. Levine (NY 1982)
Held—An atty may represent both spouses in the preparation of a separation agreement so long as there has been: full disclosure between the parties, not only of relevant facts but also of their contextual significance; and there has been an absence of inequitable conduct or other infirmity that might

vitiate the execution of the agreement.

Is There a Client–Lawyer Relationship?

If there is no relationship between the client and the atty then the atty owes the client no duty. The existence of such a relationship may depend on the reason why you are asking.

Glueck v. Jonathan Logan (2d Cir. 1981)
Atty represented client in a breach of employment contract case against former employer. The atty's firm also represented a trade organization, of which the defendant-employer was a member, in collective bargaining.
Held—Because the defendant was only a vicarious client of the firm, the firm would not be disqualified unless "the subject matter of the suit is sufficiently related to the scope of the matters on which the firm represents the association as the create a realistic risk either that the plaintiff will not be represented with vigor or that unfair advantage will be taken of the defendant." Ct found that trial ct could have identified such risks because of the relationship the firm had with defendant—representing the defendant in employment negotiations may provide the firm with info as to defendant's policies or practices.

Fund of Funds (2d Cir. 1977)
Firm represented plaintiff in actions arising in connection with alleged securities violations. Firm was aware that the investigation of plaintiff's claims may unearth accusations against another present client. Firm worked with Co-Firm on the actions. When it became clear that there was an action against Firm's client, Co-Firm was appointed by Firm to handle that claim. Firm's files and associates were used by Co-Firm in the action against Firm's client.
Held—Co-Firm was the "understudy" of Firm and was therefore limited by the

same fiduciary responsibilities that would have prevented Firm from suing the client directly. Note that the court did not hold that the co-counsel relationship alone merited disqualification of the co-counsel. Only where the co-counsel is acting as an extension of Firm in advancing suit against one of Firm's clients is disqualification appropriate.

Confidentiality in Multiple Representation

General Rule: When an atty acts for two or more parties having a common interest, neither party may exercise the atty-client privilege in a subsequent controversy with the other. This is true even where the atty acts jointly for two or more persons having no formalized business arrangement between them. Garner v. Wolfinbarger (5th Cir. 1970).

Wortham & Van Liew (Cal. 1987)
Held—Atty for a general partnership defendant must oblige discovery request of one the plaintiff partners regarding transactions engaged in by the partnership.
Rat'l—The Ct relied on the rule that joint clients do not enjoy the atty-client privilege in a civil action against one another. The Ct also stated that the lawyer's fiduciary obligation to the partners required him to reveal to each partner all matters concerning the partnership even absent a ct order.

Doesn't such a rule present a conflict between the atty's duty of confidentiality and the duties of loyalty and keeping the client informed?

New York State Opinion 555 (1984)
Held—The confidentiality

duty is superior to the duty to inform.

New York City Opinion 86-2 (1986)
Held—A lawyer retained by the general partner to represent the limited partnership should reveal to the limited partners the general partner's misconduct toward the partnership over the general partner's objection.

What happens if following a joint representation one of the clients wishes to reveal privileged information and the others object?

In re Grand Jury Subpoenas (4th Cir. 1990) & John Morrell (8th Cir. 1990)
Held—No party to the joint defense privilege (also referred to as the "common interest" rule) may waive it without the consent of the others.

Polycast Technology (SDNY 1989)
Held—There may exist two kinds of joint privilege: the joint atty-client privilege which the parties retain their right to waive without the consent of the other parties; and the joint defense privilege which may not be waived without the consent of all co-defendants. The joint defense privilege covers conversations between actual or potential co-defendants and counsel for

any common defense purpose; actual or potential litigation is a necessary prerequisite for the joint defense privilege.

The Insurance Triangle

Public Service Mutual Insurance Co v. Goldfarb (NY 1981)

Facts—Dentist held a professional malpractice policy that would indemnify him for any costs arising out of a claim or suit based upon "malpractice, negligence, mistake, assault, or undue familiarity." Dentist was previously convicted for 3d degree assault for sexually assaulting one of his patients. In the present civil suit, the insurer wants to know: if it would have to pay under the policy for damages to the victim; and if it has to defend the defendant.

Held—The dentist would not be covered under the policy if during the civil trial it was adduced that he intentionally injured the victim, but he would be covered under the policy if his intentional act had unintended consequences. Since the victims civil complaint can be construed as a claim for injuries unintentionally caused by defendant's intentional action, the defendant may seek indemnification from his insurer. Even though the insurer may ultimately not have to indemnify defendant, it still must defend him in the civil action because a claim within the stated coverage has been made. Because the insurer's interest in defending the defendant in the lawsuit is in conflict with the defendant's interest—the insurer does not have to pay if it is shown that the defendant intentionally injured the victim (if this is shown then the defendant has to pay)—the defendant is entitled to defense of his own choosing with the insurer paying the bill. See Gillers at 238 & n.*.

The Obligation to Defend

When the complaint against an insured alleges conduct that may or may not be within the policy, or when it seeks damages above the policy limits, the interests of the insurer and the insured may begin to diverge.

C. The Advocate–Witness Rule

DR 5-101(B): An atty "shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness." Unless . . . see exceptions in rule.

DR 5-102(A): After employment of atty, if "a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm . . . shall not continue representation in the trial." Same exceptions as DR 5-101(B).

DR 5-102(B): If after accepting employment for a client in a contemplated or pending litigation the lawyer learns that he or a lawyer in his firm may be called as witness by another party, the lawyer may continue the representation unless it is apparent that his testimony is or may be prejudicial to the client.

Rule 3.7: Unless an exception applies, a lawyer is prohibited from acting "as advocate at trial if the lawyer is likely to be a necessary witness." Note the rule applies only to advocacy and not pre-trial work and also does not draw a distinction between who calls the witness. Rule 3.7 only imputes the conflict in the limited circumstances in 3.7 (b).

The Advocate-Witness rule is mandatory and cannot be waived by a client. Thus, a client whose lawyer has testimony favorable to the client cannot keep the lawyer and waive the testimony. Rat'l: 1. Reluctant to damage good relations with the client, the atty may against his better judgment defer to the client's wish for

representation; 2. The party will generally be guided in its decision by the atty; 3. The client will generally be reluctant to forego the assistance of familiar counsel or to incur the expense and inconvenience of retaining another lawyer. Remember that there are exceptions to the rules—see above.

The Advocate–Witness Rule in Criminal Cases

Defense Counsel—The rule applies to defense counsel notwithstanding the defendant's willingness to waive counsel's testimony. US v. Arrington (2d Cir. 1989).

Prosecutors—The rule applies generally to prosecutors whether before a jury or before a judge at a suppression hearing. US v. Johnson (7th Cir. 1982).

II. Successive Conflicts of Interest—Chapter 6

A. Private Practice

Analytica v. NPD Research (7th Cir. 1983) (Posner)
Held—A lawyer may not represent an adversary of his former client if the subject matter of the two representations is substantially related (the lawyer will be disqualified if this happens). Posner defines "substantially related" to mean if a lawyer could have obtained confidential information the first representation that would have been relevant in the second. The substantial relationship test does not require that the client confidences actually be revealed.

The Substantial Relationship Test

Rule 1.9(a)

Cornish (Cal. 1989)
If there was even one confidential communication in the prior relationship that relates to the current dispute, a basis for disqualification exists.

Bridge Products (ND Ill. 1990)
A firm that has conducted a preliminary interview with a client may not thereafter represent the client's adversary on the subject of the interview unless the firm has instructed the prospective client that

information received will not be treated as confidential.

Evans v. Artek (2d Cir. 1983)
Three conditions for successive disqualification: 1. moving party must be a former client; 2. there must be a substantial relation between the subject matter of the prior representation and the issues in the present lawsuit; and 3. the atty whose disqualification is sought had access to, or was likely to have access to the relevant privileged info in the course of the prior representation.

USFL v. NFL (SDNY 1985)
It is the congruence of factual matters rather than areas of laws that establishes a substantial relationship.

Government of India (2d Cir. 1978)
Because of the ct's concern over the client's right to counsel of choice, the loss of time and money when counsel is disqualified, and the fact that disqualification complicates and lengthens litigation, the 2d Circuit strictly interprets the substantial relationship test. Disqualification will be ordered only when the issues in the present and prior case are identical or essentially the same. Therefore, conduct that may be unethical and grounds for discipline will not necessarily result in disqualification because different considereations apply.

The Successive Duty of Loyalty

Another goal, besides confidentiality, behind successive conflicts rules is atty loyalty. Loyalty to a client is endangered if the possibility exists that a lawyer will change sides later in a substantially related matter. Trone v. Smith.

Rule 1.9(a) & cmmt: "The second aspect of loyalty to client is the lawyer's obligation to decline subsequent representations involving positions adverse to a former client arising in substantially related matters." Note that the cmmt says that this conflict is not imputed to the atty's firm.

The Consequences of Disqualification

Analytica, Rule 1.1(a), and DR 5-105(D) disqualify all lawyers in a firm from opposing a client when any lawyer in the firm represented the client in a substantially related matter. Disqualification, not knowledge, is imputed. See extended discussion below part B.

When a lawyer is disqualified and the client hires the new counsel, the new firm will want to receive the disqualified firm's files—is it OK? An opposing party may argue that this turnover gives the new counsel the benefit of suspect work. However, absent an identifiably tainted item courts will order the turnover of the files.

Who is a Client?

Analytica: An entity is treated as a client or a client equivalent if it provides to a lawyer confidential data, the kind of which the entity would have provided an atty if it had retained one.

Westinghouse: Entity was not a formal client but because entity provided confidential information to the firm so that the firm could do work for a trade association that the entity was a member, the entity was a client for successive conflicts purposes.

When is the Client-Atty Relationship Over?

Law firms may not escape the stricter concurrent conflict rules by simply withdrawing form the representation and converting a current client is not a former one. Unified Sewerage v. Jelco (9th Cir. 1981).

A law firm may withdraw from representation for the reasons listed in DR 2-110 and Rule 1.16. A law firm's own economic interest in dropping one client to pick up a more desirable client is not a reason contemplated by these rules.

Standing and Waiver

Courts are split as to whether a nonclient has standing to seek disqualification based on a successive conflict.

Concurrent conflicts may sometimes be waived. Successive conflicts may always be waived. Rule 1.9(a).

Conflicts in Class Actions

In re Agent Orange (2d Cir. 1986):
Class counsel switched from representing class members supporting a settlement to those opposing it.
Held—The rules for disqualifying an atty who switches sides in a litigation cannot be mechanically applied in a class action. A motion to disqualify an atty that has switched from representing the class to representing a faction of it must be balanced against several factors. These include: the extent of the information that the atty received, its availability elsewhere, its importance to the issue at hand, and any prejudice that may result from applying that info; the costs involved in the faction getting new counsel; and the factual and legal complexity involved in the litigation . . . .

B. Imputed Disqualification and Migratory Lawyers

Schiessle v. Stephens (7th Cir. 1983)
Held—There is a three part test for determining whether a lawyer who leaves one law firm has infected the firm that the atty has migrated to such that the firm must be disqualified from representing a client that opposes a client represented by the atty's former firm.

1. Does a substantial relationship exist between the subject matter of the prior and the present representations? If yes then . . .
2. Has the atty rebutted the presumption that confidences were shared with him at his former firm regarding the client at issue? If no then . . .
3. Has the atty rebutted the presumption that confidences learned at the previous firm have not been shared at the new firm? If no then the atty's new firm must be disqualified.

The Ct held with respect to 3 above that the atty could rebut the presumption of shared confidences by demonstrating that institutional mechanisms were employed to insulate against the flow of confidential info (i.e., Chinese Walls). Rat'l: Prophylactic measures eliminate the harm the rule fears; attys need to be able to move freely among firms without the risk of impeding the new firm's present clients (also serves to protect clients from the inconvenience and expense of procuring new counsel).

Presumptions in Imputed Disqualification

While it is generally accepted that an atty may rebut the presumption of shared confidences at his prior firm, the position of the Schiessle ct with respect to 3 is not as popular.

Rule 1.9 cmmt rejects screening as a method of rebutting the presumption. Accord Cheng v. GAF (2d Cir. 1980); DC, NY, & NJ Ethics Rules. Rat'l: If the third part of the test was rebuttable then the client may find himself opposed by a law firm one of whose members has relevant confidential information gained in a prior affiliation. The screening method is insufficient to convince the client that its confidences are being honored.

Note the difference when the only conflict to a prior client is one of loyalty. The Model Rules provide that where a migratory lawyer is disqualified only because of loyalty to a former client, the disqualification will not be imputed to the other lawyers in the new firm. Rule 1.9 cmmt.

What happens if a lawyer leaves a firm and the firm wants to take on a new client that would have a materially adverse interest to those of a former client of the formerly associated atty? Rule 1.10(b) permits the firm to represent the new client even if the matter is the same or substantially related to that of the former client. Once the would be disqualified lawyer leaves the firm, the firm is purged of the infection and can therefore represent the new client. A firm could seek to get rid of the infected atty (or a client that presents a conflict to a prospective client)

by firing the atty (hoping the client would go with the atty it dealt with). Hartford Accident (SDNY 1989) (distinguish this from the case of the firm withdrawing from representing a client and its ensuing restrictions, see above).

Rebutting the Presumptions

Rebutting the first presumption: If an atty can clearly and effectively show that he had no knowledge of the clients confidences, disqualification is unnecessary. Freeman (7th Cir. 1982). Problem arises when, if you are the atty trying to disqualify the migratory atty, you cross-examine the migratory lawyer. Can you cross-examine without revealing the confidential information.

Rebutting the second presumption: In a jurisdiction where you are allowed to rebut the second presumption (i.e., not in the 2d Cir., NY, or NJ), the party seeking to avoid disqualification must prove that the firm took effective steps to protect against leaks of confidential information (screening, Chinese Walls, etc.).

C. Government Service

Armstrong v. McAlpin (2d Cir. 1980)
SEC atty left SEC to work in private practice for a firm that was representing a person that the SEC atty had investigated while at the SEC. The firm took efforts to screen the atty from the ongoing litigation.
Held—It is not per se grounds for disqualification that an atty involved in a government investigation joins a private firm involved in litigating the same matter. If a ct finds a prior government atty to be effectively screened from the private litigation then disqualification is unnecessary.
Policy reasons for decision: absent such a rule government attys would have a hard time getting work in the private sector and, in turn, the government would have a hard time getting attys to work for it.

The Revolving Door in the Model Rules

There may be a legitimate concern that former government employees not be able to profit from information learned in their government positions.

General Motors (2d Cir. 1974).

Rule 1.11(a) rejects this concern (partially): the lawyer may represent a private client in a matter in which the atty personally and substantially participated as a government employee so long as the government agency consents after consultation. But the lawyer may still be disqualified if the atty acquired confidential government about a person while in service and sought to represent a client with interests adverse to that person. See Rule 1.11(b).

Similar rules apply for an atty going from private practice to public employment. Rule 1.11(c).

Note that many jurisdictions have statutes controlling postdeparture work.

What is the meaning of "Matter and" "Substantial Responsibility"?

DR 9-101(B): "A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee."

"Matter": The term contemplates that there be a discrete isolatable transaction between a party or set of parties. The same issue of fact involving the same parties, lawsuit, litigation, situation . . . is the same matter. ABA Formal Opinion 342 (1975).

"Substantial Responsibility": It contemplates a responsibility requiring the official to become personally involved to a material degree in the investigative or deliberative processes regarding the transaction or facts in question.

PROFESSIONAL RESPONSIBILITY

Class 6: Chapter VII-- Ethics in Advocacy

I. Truth and Confidences-- Client Perjury Problem

A. Conflict exists between whether a laywer's duties of confidentiality and loyalty shall be superior to any duty the lawyer would otherwise have to correct a fraud on the court or whether instead the lawyer as an officer of the court has a duty to correct such frauds notwithstanding that doing so will reveal a client's confidences.

1. The Model Rules provide that correction of fraud should prevail over client confidentiality. So, if client refused to rectify the wrong, then the lawyer must disclose knowledge of the wrong.

See Rule 3.3

a. First, lawyer should "remonstrate with the client." Remonstrate means the lawyer must tell the client that he was wrong and that he must now rectify the wrong.

b. If client refuses to rectify wrong, lawyer should seek to withdraw or disclose the relevant information.

2. The Code provides that confidentiality should prevail over correction of client's perjury. See DR 7-102(B)(1). Lawyer shall reveal the fraud, except when information is protected as a privileged communication.

3. Nix v. Whiteside: Held that there is no violation of 6th Amend. right to effective assistance of counsel when lawyer refuses to cooperate with criminal Δ in presenting perjured testimony. Lawyer successfully dissuaded client from committing perjury.

II. Fostering Falsity

A. Cross Examining "Truthful" Witnesses

1. Tragic Fire- Great Cross Examination by Max Steuer
   Although the general rule is that lawyers do not ask witnesses to repeat harmful testimony b/c repetition reinforces bad impact, here repetition was used to show that testimony was a prepared recital of facts rather than a spontaneous recollection of actual events.

2. Letter to the Editor: criticism of Steuer's approach: conclusion fails to consider that the witnesses did not speak English and that they barely survived a traumatic fire.

B. Arguing for False Inferences:

1. Professor Subin's position: It should be improper for an attorney who knows beyond a reasonable doubt the truth of a fact to attempt to refute that fact through evidence, impeachment, or argument.

2. Professor Mitchell's position: It is acceptable to present evidence or testimony that is not itself false in order to accredit a false theory or to raise doubt about the prosecution's case.

3. Subin's response to Mitchell's position:
   Mitchell's presentation is flawed: his closing argument is designed to persuade the jury of the existence of facts he knows not to be true. While it is not a lie, it creates a false impression which amounts to the same thing.

4. The Code and Model Rules proscribe false statements of facts but not false inferences. There is nothing in the ethical standards prohibiting counsel from leading the jury to a false finding.

C. Literal Truth

In Bronston v. United States, the witness testified under oath truthfully and completely on its face. It did not matter that he intended to evade and mislead. It is responsibility of cross examination to flush out the whole truth.

D. Coaching

Witness preparation is ethical b/c in matters of complexity, memories need to be refreshed, ordered, stimulated and papers or diaries need to be reviewed. But, the process often extends beyond helping organize what witness knows and moves in direction of helping witness to know new things.

E. Exploiting Error

1. DR 7-101 requires counsel to represent client zealously but within boundaries of legal and ethical rules.
2. DR 7-102(4) prohibits counsel from using perjured testimony or false evidence but it is acceptable to call a witness who will present truthful testimony.

F. Silence

1. Silence is permissible as long as lawyer does not assist another in committing a crime or fraud subject to rule 3.3(a)(4) and (b).
2. Rule 3.3(a)(2) prohibits misrepresentations by omissions. The rule requires lawyers to speak up to prevent a fraud on the court when the substantive law makes silence actionable.

III. Misstating Facts, Precedent, or the Record

A. The Code and Rules forbid lawyers to make false statements of fact or law. See DR 7-102(A)(5) and Rule 3.3(a)(1).

Wyle v. R.J.Reynolds: deliberate ignorance constituted knowledge of the truth.

B. Obligation to Reveal Adverse Legal Authority

1. Rule 3.3(a)(3) and DR 7-106(B)(1) provide that lawyer must disclose legal authority that he knows is directly adverse to his client's position.

2. Jorgenson v. County of Volusia (1988): appellants filed a memo of law that failed to cite two clearly relevant adverse cases. They defended that the cases were not cited b/c they were not controlling. However, this violated DR 7-106(B)(1). District court imposed rule 11 sanctions. Court affirmed.

C. Obligation to Reveal Client has No Case?

1. Anders v. California: Court held that an appointed lawyer who moved to withdraw after concluding that indigent Δ had grounds for appeal had to include a

discussion why issue lacked merit.

2. McCoy v. Ct. of Appeals of WI: lawyers must not only cite the cases, statutes and facts of record to support conclusion that appeal is meritless but also include brief statement of why these citations lead attorney to believe that conclusion.

3. Affirmative steps are required to avoid mistaken conclusions and to ensure counsel's diligence.

IV. Destruction or Concealment of Physical Evidence

A. Code does not directly preclude an attorney from advising a client to destroy possible evidence.

1. Code does refer to situations in which destruction of evidence is illegal.

2. DR 7-102(A)(3) provides that "lawyer should not conceal or knowingly fail to disclose that which he is required by law to reveal."

3. Attorneys have ethical and legal duties not to tolerate perjury or fabricate evidence, but they don't have a duty to volunteer material facts.

B. People v. Meredith (1981): Held that if defense counsel leaves the evidence where he finds it, his observations derived from privileged communications are insulated from revelation. If however, counsel removes the evidence to examine it or test it, the original location and condition of that evidence loses the protection of the privilege (b/c such act deprives the prosecution of an opportunity to observe the evidence in its original location or condition).

C. Could Nixon have destroyed the Tapes?
1. If destroyed the tapes b/c necessary to prevent secret exchanges, probably ok.
2. Destruction in light of future subpoena is obstruction of justice and illegal-can't destroy it

D. ABA's Advisory Solution (4-4.6: Physical Evidence)
Disclose evidence if required by law or court order or else return item to original source, but if item is contraband (in and of itself illegal) and no case is pending, then may advise client to destroy it, but if case is pending, then destruction is obstruction of justice. Otherwise, lawyer should disclose or deliver the item to the authorities.

E. Spoliation of Evidence
In some jurisdictions, destruction of evidence may not only have evidentiary consequences, it may also be a tort.

F. Subpoenas to Criminal Defense Lawyers
1. The gov't has increased its use of subpoenas of criminal defense attorneys to testify before the grand jury. The gov't seeks information on amount of fee paid to attorney, whether it was paid in cash, and whether client or

third party paid it b/c this is relevant in light of RICO.

2. United States v. Klublock (1987): the court adopted a rule that was later codified as Rule 3.8(f).

G. Fee Forfeitures

1. Caplin & Drysdale v. United States (1989): S.Ct held that forfeiture statute does not include an exemption for assets that Δ wishes to use to pay an attorney. Δ does not have right to attorney of his choice; only to adequate representation. The statute is consistent with the 5th and 6th amendments.

2. United States v. Monsanto (1989): Held that assets in a Δ's possession may be frozen before convicted based upon a finding of probable cause to believe that the assets are forfeitable.

Class 7: Chapter XIII-- Control of Quality:
Remedies for Professional Failure

I. What is Malpractice?

A. Liability to Clients

1. Who is a client?
Togstad v. Vesely (1980): The wife was the lawyer's client b/c she sought his legal advice and lawyer assumed to give his professional opinion on the matter. Her claim is based on theory that he breached duty of care. BREACH: failure to do research, to disclose about statute of limitations, to consult a specialist in the field, and to contact her to tell her there was no case constituted a breach of duty. Must also show causation and damages.

2. Scope and Duration of Relationship
a. Scope: Jackson v. Pollick: lawyer must accept the claim in order for it to be within the scope of his responsibilities.
b. Duration: Lama v. Shearman & Sterling: Duty to advise client exists if it is established that such advice will be rendered.

3. Appointed Lawyers
Ferri v. Ackerman: Appointed lawyer must observe same level of care as paid lawyers-- no immunity. (But, prosecutor has absolute immunity).

B. Breach of Fiduciary Duties
1. Duty of loyalty requires lawyer to avoid conflicts of interest. If client suffers loss as result of lawyer's conflict, client can recover in malpractice.
2. Duty of confidentiality requires fiduciary not to use confidences to client's disadvantage.
3. Sex with Clients: issue arises often in divorce cases where attorney initiates intimate relationship with vulnerable female client. Some courts refuse to find breach of duty. But, in McDaniel v. Gile held that lawyer caused intentional infliction of mental distress and malpractice b/c lawyer had special relationship with client and was in position of power over her.

C. Third Parties as Client-Equivalents

Classic example is Drafting of Wills: a third party (intended beneficiary) seeks to hold attorney liable for lack of care in performing legal service. Lawyer claims owed third party no duty: and this defense may or may not work. There is no general rule.

a. Vanguard v. Martin: Held that lawyer for mortgage lender was liable to purchaser of real property for failure of ordinary care b/c purchaser was among the class of nonclients which as a natural and probable consequence of the attorney's actions could be injured.

b. Fox v. Pollack: court refused to impose duty on lawyer for one party to the opposing unrepresented party who claimed that the agreement the lawyer prepared did not accurately reflect the parties' oral understanding. Court held the other party was not the intended beneficiary of the lawyer's service.

D. Vicarious Liability

1. All partners liable for partner's wrongful acts within scope of the partnership business even if other partners are unaware of those acts.

a. Dresser v. Digges: lawyer overcharged client and all partners held liable b/c billing was within scope of firm's business and b/c should have supervised this.

b. Sheinkopf v. Stone: 1st Cir. declined to hold law firm liable for fraud of partners b/c no evidence that investment created an attorney client relationship with the firm and b/c partner's actions were not in the ordinary course of firm's business.

II. Proving Malpractice

A. Expert Testimony

1. Wagenmann v. Adams (1987): Generally, in an action for legal malpractice, expert testimony is needed to establish both the level of care owed by the attorney and the alleged failure to conform to that benchmark. However, an exception is made when the malpractice is so gross or obvious that laymen can rely on ordinary knowledge to recognize negligence. In this case, Δ committed malpractice that was so gross that expert

testimony was not required.

2. Waldman v. Levine: lawyer did do something, but just not enough to conform to standard of care required, thus held lawyer committed malpractice.

3. Beattie v. Firnschild: proof of a violation of DR does not relieve π of obligation to present expert testimony, thus court did not make finding that committed malpractice.

B. Place of Ethical Rules in Actions Against Lawyers
1. Miami Int'l Realty v. Paynter: Held that an expert witness may base his opinion on a state code of professional responsibility.
2. Fishman v. Brooks: violation of code or rules is not itself an actionable breach of duty to client.
3. Carlson v. Morton: attorney who breaches ethical duty owed to client may not be liable to client if lawyer's conduct does not violate civil law standard.
4. Lazy Seven Coals Sales v. Stone: Code is not designed to create a private cause of action for infractions of rules but is designed to establish a remedy that is disciplinary in nature.

C. Causation
1. Must prove that lawyer's breach caused damages.
2. Must show that but for lawyer's negligence, the underlying case would have ended more favorably for the former client. Some jurisdictions only require that the malpractice be a material and substantive cause of loss, not the proximate (but for) cause.
3. Causation in Criminal Cases
Carmel v. Lunney: Held that π must allege his innocence in order to state a cause of action for legal malpractice arising from negligent representation in a criminal proceeding. As long as determination of client's guilt remains undisturbed, no cause of action will lie against the attorney.

E. Damages or Injury
1. Client must prove lawyer's default caused a loss.

2. Many, but not all, jurisdictions decline to recognize noneconomic injuries.

3. Courts are divided over whether the client's recovery

ought to be reduced by the fee the lawyer would have earned had not acted negligently.

That is, if client was damaged by $30,000, some courts say the judgment should be reduced the $10,000 that the lawyer would have received had he acted properly, others disagree.

III. Beyond Malpractice: Other Grounds for Attorney Liability to Clients and Third Parties

A. Greycas v. Proud (1987): Δ, Proud, wrote letter for brother without exercising any care at all. He was held liable to Greycas, one adverse to his brother as a result. Even though Greycas is one adverse to his client, the adversarial or non-adversarial aspect of the parties relationship is not significant if there is a duty owed. A reasonable lawyer would have found out if other liens were made before writing the letter- but Proud used no such care to see that the information was correct. Since Proud made representations which induced reliance to Greycas' detriment, Proud is liable.

B. Expanding Universe in Professional Liability

1. Consumer Protection Laws
   Guenard v. Burke: client was allowed to invoke state law forbidding unfair practices in trade in connection with action against former attorney. Court assumed that the practice of law was a trade within the meaning of the statute.

2. Fraud and Negligent Misrepresentation
   a. Dupont v. Brady: former client charged former counsel with securities and common law fraud.
   b. Cressweel v. Sullivan & Cromwell: π charged that Δ firm had fraudulently and negligently withheld documents during litigation and as a result π settled for less than they would have been able to collect. But, judge held π's lawyer should have discovered these facts.
   c. Even New York, a jurisdiction that demands privity before a lawyer can be held liable to another for a professional error, has permitted negligent misrepresentation claims against lawyers.
3. Errors of Law
   Lawyers who misrepresent the law may be liable to their clients but not to third parties unless the third party is treated as a client.
4. Helping Fiduciaries Breach their Duties
   Albright v. Burns: Lawyers who assist fiduciaries in violating their duties to beneficiaries may be held liable to the beneficiaries if harm was foreseeable.
5. Government Lawyers
   Gov't lawyers may be held liable for breach of duty despite general rule of immunity.
6. Inducing Breach of Contract

If X induces Y to breach K with Z, Z may sue X for interference. But, if X had a fiduciary relationship with Y, then X has defense--fulfilling his duty to protect his principal's interests.

7. Violation of Escrow Agreement
   a. Escrow agreement involves holding property or cash pursuant to an agreement b/t two parties, one of whom is usually the lawyer's client.
   b. When lawyer acts as escrow agent, lawyer assumes responsibilities that transcend the attny-client relationship.

8. Abuse of Court Process
   one common tort is malicious prosecution-- that is, prosecution without probable cause and for an improper purpose.

9. Ethical Violations
   Barker v. Henderson: charged lawfirm that aided and abetted in violation of rule 10b-5. Held that lawfirm was guilty of malpractice in the advice it gave the Foundation but securities law do not impose liability for ordinary malpractice. Court rejected liability on grounds of deception as well.

IV. Discipline

A. Purposes of Discipline
   1. remedy for professional failure
   2. vindicates public's interest in preventing unethical behavior
   3. Factors to consider in determining sanctions: nature of offense, need for deterrence, reputation of the bar, protection of public and clients, expression of condemnation, justice to respondent.

B. Sanctions
   1. Disbarment: indefinite or permanent exclusion from the bar.
   2. Suspension: right to practice in the bar is denied for specific period of time
   3. Censure: public reprimand

C. Acts Justifying Discipline
   1. In Re Warhaftig: trust accounts were abused- lawyer took money from client's accounts before he had legal right to the money. Even if money was returned and no harm done (so no malpractice), court ordered disbarment.

   2. In Re Austern: lawyer knowingly assisted his client in

conduct involving dishonesty and misrepresentation (funded an escrow account with a worthless check). Even though no damages, his conduct in furthering a transaction that was fraudulent violates DR 7-102(A)(4), (7). He was under a duty to withdraw from representation and the court ordered sanction of public censure.

3. In Re Colin: lawyer knowingly attempted to evade income tax in violation of Tax Code. Court ordered public censure b/c he was also separately punished for his crime.

4. Sexual Relations with Clients
   a. Committee on Professional Ethics v. Hill: Lawyer engaged in sexual activity with client, at suggestion of client that sex be payment for legal services. Commission found sex with client in a divorce action constituted unethical conduct regardless of whether sex was for payment. Court suspended lawyer for three months.

   b. Should lawyers be forbidden to have sexual relations with clients? California Bar recommends rule in which a member shall not require or demand sexual relations, employ coercion, intimidation or undue influence or continue representation of client with home he has sexual relations with if it causes incompetent performance of legal services.

   c. Private consensual sexual activity almost never leads to discipline even though it may offend community standards.

5. Lawyer's Private Life: Crimes like tax evasion or use of drugs even though unrelated to practice of law can lead to discipline.

6. Racist and Sexist Conduct
   a. Courts are increasingly willing to discipline lawyers for racist or sexist conduct in connection with public roles.
   b. People v. Sharpe: lawyer stated in hallway: "I don't believe either of those chili-eating bastards" and the court imposed public censure b/c public officials need to avoid statements that can be perceived as racially prejudicial.

7. Failure to Report another Lawyer's Misconduct
   a. DR 1-103(A) requires that a lawyer voluntarily report any disciplinary violation by another lawyer to the authorities.
   b. Affirmative duty of whistle-blowing applies to lawyers in same firm or in another firm.
   c. Judges are subject to this "squeal rule"
   d. The rules limit the reporting of misconduct to conduct that raises a "substantial question as to another lawyer's honesty, trustworthiness, or fitness as a lawyer.
   e. The Code does not have a parallel limitation but it does excuse reporting if the knowledge is privileged, but not if it is just a secret.
   f. In re Himmel (1988): First court where a disciplined lawyer was charged with nothing but failing to report another lawyer's misconduct b/c the knowledge of the violation was a secret but not a confidence. Under the Code, reporting was obligatory. Under the Rules, get opposite result--the information would have been confidential and thus not obligated to report without the client's permission.

E. Disciplinary Procedures
   1. In re Ruffalo: S.Ct. described that lawyer subject to discipline is entitled to procedural due process: safeguards of notice and a hearing.

   2. Zauderer v. Office of Disciplinary Counsel: S.Ct. held that the appellant was afforded notice and an opportunity to respond and thus the due process requirements were satisfied.

   3. Other due process rights include: opportunity to confront the evidence against the respondent attorney and to cross examine witnesses; the right to present witnesses and argument on one's own behalf; the right to assert the privilege against self incrimination; and the right to have the facts determined and the sanction imposed by an impartial body.

F. Readmission to the Bar
   1. Disbarment is not necessarily permanent.
   2. In considering whether attorney shall be readmitted, courts weigh public interest, prior character and standing

of attorney, attorney's mental and moral qualifications, reason attorney was disbarred in first place, conduct while disbarred, length of time the disbarment lasted, whether restitution was made, attorney's fitness to practice law, and evidence that he has reformed.

PROFESSIONAL RESPONSIBILITY
CASEBOOK NOTES

PAGES 1 - 70

A. Elements of the Client-Lawyer Relationship

1. Confidentiality (**Rule 1.6; DR 4-101, 7-102**): Generally, all privileges are ethically protected information but not all ethically protected information is privileged.

a. Ethically protected information
   i. Code: "confidences"
   ii. Rules: "secrets"

b. Privileged information
   i. Rules of evidence, common law, statutes
   ii. Information communicated for the purpose of obtaining legal advice

c. In re James M. Pool: Attorney got the keys to the client's safe deposit box by striking a deal with the prosecutor, who then search the box. The attorney was disbarred for disclosing the confidential information to the prosecutor without the client's consent.

d. **Upjohn v. United States**
   i. Questionnaires given to the company's employees at the request of the attorney are privileged.
   ii. Client = entity, not the individuals
   iii. Communication is privileged, not the underlying facts
   iv. Entity can waive privilege, not an employee

e. Exceptions: **Self-defense**; Collection of fees; Waiver; Crime-Fraud; Public Policy; Identity and fees (p. 38) are generally not privileged because they are not information conveyed for the purpose of obtaining legal advice. However, Rule 1.6 is very broad and seems to include fees and client identity.

g. Rule 1.6(b)(1) states "may reveal;" in N.J. and Fla., the statute states "must reveal."

2. Agency
    a. Retainer should be defined as far as reasonably possible
    b. **Taylor v. Illinois**: Defense attorney willfully violated rule on witnesses presented at trial. As a sanction, the judge refused to let the defendant call a witness who would have helped the defendant.
        i. Majority: Since the lawyer has full authority to manage the case, the client must accept the consequences of the attorney's actions.
        ii. Dissent: Where a criminal defendant is not personally responsible for the discovery violation, alternative sanctions are proper and deter further deliberate violations.
    c. **Cine 42nd St. Theatre v. Allied Artists**: Where gross professional negligence is found, the court may issue the full range of sanctions. The plaintiff's claim for damages was dismissed.
    d. Vicarious admissions: **U.S. v. McKeon** held that information given by an attorney (which the attorney presumably got from the client) is evidence which can be used against the defendant, even if the information is used in the attorney's opening statement. The attorney was disqualified because he could be called as a witness at the trial (that the gave him false information which he relayed through an opening statement). Harsh sanction upheld for attorney.

3. Fiduciary
    a. Arises after the formation of the attorney-client relationship because (1) client begins to rely on the attorney's integrity, fairness, and judgment; (2) attorney may have information which gives her an unfair advantage in negotiations; (3) fee arrangement makes client dependent on attorney

4. Loyalty and Diligence
    a. Loyalty requires the lawyer to pursue, and be free to pursue, the client's objectives unfettered by other conflicting responsibilities or interests.
    b. Diligence requires the lawyer to pursue the client's interest without undue delay.

5. Duty to Inform
    a. Keep client's reasonably informed so that the client

has the information necessary to make decisions

b. Attorney is obligated to communicate settlement offers and plea bargains

B. Autonomy of Attorneys and Clients

1. Lawyer's Autonomy

a. Jones v. Barnes

i. Majority: Defense counsel assigned to prosecute an appeal from a criminal conviction does not have a constitutional duty to raise every nonfrivolous issue requested by the defendant.

ii. Dissent: 6th Amendment states that the attorney is to assist the client and therefore the attorney should raise every claim requested.

b. People v. White: It is within the appellate court's discretion whether to accept pro se briefs filed by defendants whose appellate attorneys fail to include requested nonfrivolous issues in their briefs.

2. Client's Autonomy

a. Olfe v. Gordon: Expert testimony is not required to show that the agent (attorney) violated his duty by negotiating a contract for a second mortgage the client specifically instructed him only to negotiate a first mortgage.

b. Certain decisions belong to the client, e.g. civil: settlement, stipulations to facts or law, appeals; criminal: pleas, whether to testify, presence at trial, waiver of jury trial, appeals, submission of lesser included offenses to the jury

C. Terminating the Relationship

1. Termination by the Client
   a. For any reason or no reason
   b. Assigned counsel cannot be fired, but the client can request the court to assign new counsel
   c. Not too close to or during trial
   d. Cannot be used as a means to delay trial

2. Termination by the Lawyer (Rule 1.16 and DR 2-110)
   a. Permissive withdrawal for "professional reasons," e.g. the lawyer reasonably believes that the client is using the lawyer for criminal or fraudulent action
   b. Lawyer can withdraw or threaten to withdraw if the client's objective is repugnant or imprudent
   c. Unreasonable financial burden on lawyer
   d. In above situations, lawyer can withdraw even if the withdrawal will have a material adverse effect on the client's interests
   e. Lawyer can withdraw for no reason if the withdrawal occurs with no material adverse effect on the client's interests
   f. Lawyer has a duty to withdraw in certain situations because of the conduct or anticipated conduct of her clients

CHAPTER III
PROTECTING THE CLIENT-LAWYER RELATIONSHIP
AGAINST OUTSIDE INTERFERENCE
Pages 71 - 100

A. Communicating with Another Lawyer's Clients
  1. Rule 4.2 and DR 7-104(A)(1)
    a. Conditions
      i. Representative capacity
      ii. Knowledge (which can be inferred)
      iii. Subject
      iv. Exceptions: Consent or authorized by law
      v. Forbidden conversation through a third party
    b. No Contact Rule: Cannot communicate with another party about the subject matter of a case
  2. Civil Matters (page 73)
    a. Straightforward if parties are individuals
    b. **Niesig v. Team I**
      i. The court adopts an **alter ego test** which defines "party" to include corporate employees whose **acts or omissions** in the matter under inquiry **are binding on the corporation** or imputed to the corporation for purposes of its liability, or employees implementing the advice of counsel.
      ii. In this case, the employee-witnesses could be interviewed informally because they were **mere witnesses**.
      iii. Applies to **current employees** only
      iv. The concurring judge favors the control group test, which was rejected in Upjohn.
    c. Scope of secrecy
      i. Some prohibit communication on any subject within a current employee's scope of employment, but Niesig does not prohibit contact with former employees
    d. Violation of the rule may lead to disqualification or the suppression of evidence
    e. Government as a party
      i. Balance desirability of affording the government as a party the same kinds of protection against uncounseled concessions of interest afforded other parties and desirability of ensuring largely unrestricted public access to government as a check against mismanagement and malfeasance
      ii. In criminal cases, the defense counsel are free to speak to witnesses including the

complainant/victim although the witnesses may refuse

3. Criminal Matters
    a. **United States v. Hammad**
        i. Holding: In light of the purposes of the Code and the exclusionary rule, suppression may be ordered in the trial court's discretion.
        However, in this case, the district court abused its discretion in suppressing the evidence.
        ii. The Supreme Court rejects the government's argument that state ethics rules should not apply to federal agents (like the Thornburgh Memorandum).

    b. Ethics and Crime Fighting
        i. United States v. Dennis held that if a defense lawyer's conversation with a government witness violated the ethical rule, then the sanction, absent serious prejudice to the witness or taint to the trial, should be disciplinary action, not a limitation of the cross-examination.
        ii Rules 3.3(a)(1) and 4.1(a) forbid a lawyer from lying to courts or others. Hammad turned on the fact that the subpoena was false as a basis for finding an ethical violation.

B. Improper Acquisition of Confidential Information
    1. Spirit of the ethical rules precludes an attorney from acquiring, inadvertently or otherwise, confidential or privileged information.
    2. When a lawyer for one client tries to debrief an expert retained by the other side.
    3. Sanctions
        a. Disqualification
        b. Suppression of the evidence
    4. Powers v. Chicago Transit Authority held the lawyer in contempt and then dismissed the case when the lawyer refused to identify the source who gave him a decisive memo in the action. Since the source of the memo was essential to the case, the court did not abuse its discretion.
    5. United States v. Ofshe
        a. Prosecutor's conduct was found by the trial court to be reprehensible because he used a defendant's attorney as an informant to prosecute the defendant for other drug violations (Prosecutor = Turow)
        b. The Justice Department's inquiry cleared Turow

Chapter IX - Lawyers for Entities

Who is the client:

Rule 1.13(a) defines the relationship between the parties by stating: "A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."

A "corporate attorney" owes a duty to act in accordance with the interests of the corporate entitiy itself. Thus, a corporate attorney may not serve the corporation in a particular matter and then represent a plaintiff in a suit against it or its officers in a substantially related matter.

Evans v. Artek Systems (2d Cir. 1983) - Held that an individual member of management or the board of directors has the right to seek the advice of an attorney who does not represent the corporation as an entity but instead can represent the plaintiff in an individual capacity. The question of whether an attorney-client relationship exists between the corporation and that attorney depends upon whether the dissident was acting for himself or a separate group rather than for the corporation in consulting outside counsel.

Rule 1.13(d) directs a lawyer to "explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing."
Rule 1.13(e) permits joint representation of an organization and its constituents subject to the concurrent conflict provisions of Rule 1.7.

- in a stockholders derivative action outside counsel must be retained to represent one of the parties in the suit because of the conflict of interests created.

Whistleblowing and Retaliatory Discharge:

Balla v. Gambro, Inc. (Ill. 1991) - Held that, generally, in-house counsel does not have a claim under the tort of retaliatory discharge. The rule that a client may discharge his attorney at any time, with or without cause, applies equally to in-house counsel. Also, this rationale does not leave in-house attorneys with a choice of either reporting grave company improprieties and risk being discharged or complying with the employer's wishes and risk loss of a professional license or criminal sanctions. In-house counsel does not have such a choice because they must always abide by the Rules of Professional Conduct.

Rule 1.13(b) and (c) deal with corporate counsel "whistleblowing."

Basically, if the lawyer knows that an officer, employee, or other person associated with the organization is engaged in action or intends to engage in action that is detrimental to the corporation or a violation of law that is likely to be imputed to the corporation the lawyer shall proceed as is reasonably necessary in the best interest of the organization. The lawyer should:
1) ask reconsideration of the matter;
2) advise that separate legal opinion on the matter be sought;
3) refer the matter to a higher authority in the organization - "go up the corporate ladder."
If despite the lawyers actions the highest authority that decides on the matter insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign in accordance with Rule 1.16.

Chapter XV - Free Speech Rights of Lawyers

Lawyer's free speech issues arise when a lawyer speaks to the press on a case (usually in litigation) with which he is associated and when a lawyer criticizes a judge or the courts.

Rule 3.6(a) - A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

Gentile v. State Bar Of Nevada (1991) - Held that Nevada's Rule 177, almost identical to ABA Rule 3.6, was void for vagueness in that it did not provide fair notice to those to whom it was directed. Regardless, the Court also held that there was no evidence that petitioner knew or should have known his remarks created a substantial likelihood of material prejudice nor that there was a bais for finding that the speech presented a substantial likelihood of material prejudice. Rather, petitioner sought only to stop a wave of publicity he perceived as prejudicing potential jurors against his client and injuring his client's reputation in the community.

Matter Of Holtzman (N.Y. 1991) - The charge was based upon a public release by petitioner charging a Judge with judicial misconduct in relation to an incident that allegedly occured in the course of a trial on criminal charges of sexual misconduct. The court held that petitioner engaged in conduct that adversely reflected on her fitness to practice law in releasing a false accusation of misconduct against the Judge. The guiding priciple is whether a reasonable attorney, familiar with the Code and its ethical strictures, would have notice of what conduct is proscribed. Here, petitioner knew or should have known that such attacks are unwarrrented and unprofessional, serve to bring the bench and bar into disrepute, and tend to undermine public confidence in the judicial system.