I. Attorney-Client Relationship

A. When there is a client? (p. 18-21)

1. Whether an attorney-client relationship exists is a question of law, not ethics
   a. Money need not change hand
   b. Reasonable belief of person claiming to be client is important
   c. No formalism is necessary
      1. Written agreements are wise, though
   d. Client need not be a person or persons
      1. Corporations, trade associations, estates, governments

2. Attorney-Client relationship does not exist when:
   a. Action taken w/out the “client’s” knowledge or consent does not create a relationship even if it benefited the “client”

3. The Class Action Client
   a. lawyer owes duties to entire class
   b. distinction b/t lawyer and class may dissolve if lawyer is only one with a significant financial interest in the outcome of the litigation

B. Elements of the Attorney-Client Relationship

1. Competence
   a. Rule 1.1
      1. Requires lawyers to provide clients with “competent representation,” defined as “the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”
   b. Incompetence
      1. Definition differs
         a. differs by jurisdiction, some specific minimums, others general
         b. specialists often subject to a higher standard of care
      2. Can lead to discipline, but rarely does w/out egregious error or a pattern of neglect
      3. Often the basis for malpractice liability
         a. if client suffers damages, or
         b. for an ineffective assistance of counsel under the Sixth Amendment

2. Confidentiality
   a. Generally
      1. Ethically protected v. privileged (Comment [5] to Rule 1.6)
         a. Privilege Info: Information that the rules of evidence prohibit a court from forcing an attorney to reveal
            1. Most privileged info with also be ethically protected as a confidence
            2. May be lost for any information the client gives the lawyer in the presence of third persons unconnected to the representation
         b. Ethically Protected Info (Confidences): protected by the Rule of Ethics
            1. Much information that is ethically protected will not be privileged
            2. Confidentiality continues even if persons other than the lawyer know of the information, whether through the client or otherwise.
            3. A client will not be permitted to refuse to disclose info simply b/c it is ethically protected; it must be legally privileged.
4. Improper use of confidences may be criminal

2. **Rule 1.6(a)**
   a. Lawyer prohibited from revealing info. “relating to representation” unless
      1. the client consents after consultation
      2. A disclosure that is impliedly authorized in order to carry out the representation
      3. exceptions stated in 1.6(b)
   b. Duty continues after the attorney-client relationship has terminated.
      Comment [22].

b. Confidentiality and the entity client
   1. **Rule 1.13 Organization as Client**
      a. Lawyer has the same ethical duties under Rule 1.6 whether the client is a biological person or an entity
      b. Special Problems
         1. whose communication with entity counsel will be protected?
            a. The narrowest test: whether the lawyer’s communication was with a person in “control group” of the entity.
               1. no longer used in Fed. Cases after S.Ct. decided Upjohn v. U.S.
            b. Subject mater test (Broader): whether the info. was imparted to the lawyer to enable her to give the entity legal advice
                  a. attny-client confidentiality exists where counsel interviews employee to give appropriate legal advice
                  b. overruled 6th Cir. use of the “control group” test; criticized as unpredictable.
               c. this test is very protective of the org., promotes corp. secrecy
            c. Arizona state court approach; **Samaritan Found. v. Goodfarb**
               1. focus on the nature of the communication; didn’t look @ status of employment, but to whether acting in scope of employment
               2. said control group test too broad and too narrow
               3. Overruled later by Ariz. Legislature; almost back to subject matter test

   2. When can you break confidence of an individual w/in the org
      a. **Rule 1.13(b)**: If a lawyer for an org “knows” that an ind. associated with the org. is or intends to violate a law that might be imputed to the org. and likely to result in substantial injury to the org., lawyer may act as reasonable necessary in the best int. of the org, including:
         1. asking for reconsideration of the matter;
         2. advising that a separate legal opinion be sought for presentation to the appropriate authority in the org
         3. referring the matter to higher authority in the org.

c. Exceptions to confidentiality
   1. **Rule 1.6(b)**: A lawyer may reveal confidential info. to the extent the lawyer reasonably believes necessary:
      a. (1) to prevent the client from committing the criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or
      b. (2) to establish a claim or defense on behalf of the lawyer in a controversy b/t the lawyer and the client, to establish a defense to criminal charge or civil claim against the lawyer based upon conduct in which the client was
involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client.

2. Rationale for the exceptions
   a. protect attorney autonomy and self-preservation
   b. protects the court
   c. public policy

d. Client waiver of confidentiality
   1. implicit
      a. client may waive by revelation of all or part of a confidential communication
   2. explicit

e. Confidentiality of Client Identity and Fees
   1. Normally, the client identity and the source of the fees are not protected
   2. Exceptions
      a. the legal advice exception
         1. protects client identity and fee information when there is a strong probability that disclosure would implicate the client in the very criminal activity for which legal advice was sought.
      b. the last link exception
         1. prevents disclosure of client identity and fee information when it would incriminate the client by providing the last link in an existing chain of evidence
      c. the confidential communications exception
         1. protects client identity and fee information if, by revealing the information, the attorney would necessarily disclose confidential communications.

3. Attorney’s function/role
   a. Agency
      1. Lawyers are their client’s agents, so lawyer conduct attributable to the client -- client chooses counsel at his peril.
      2. Client bound by attorney conduct, won’t look into lawyer conduct b/c would violate client-lawyer relationship. Taylor v. Illinois
      3. Must consult with client about means. Rule 1.2(a)
   b. Fiduciary
      1. attorney is in a position of trust toward a client
      2. duty to be truthful with client; if mess up, must tell client

4. Attorney’s duties
   a. General Duties
      1. Duties owed to: Client, System, Society, Self
      2. Conflict b/t duties
         a. Client most important!!
         b. Duty to client often conflicts with others, especially duty to system
   b. Specific Duties to Clients
      1. Duty of Loyalty
         a. pursue client’s objectives unfettered by other conflicting responsibilities or interests
         b. extends after the representation
      2. Duty of Diligence
         a. Rule 1.3: a lawyer shall act with reasonable diligence and promptness in
representing a client.

b. pursue client ends w/out unreasonable delay

3. Duty to Inform and Advise
   a. Rule 1.4
   b. Nichols v. Keller, lawyer should’ve informed client of other claims b/c so closely related
   c. The client’s right to know
      1. must tell client if violate duty of care or fiduciary duty

C. Autonomy of attorneys and clients
   1. The Attorney’s autonomy
      a. Comment [1] Rule 1.3; lawyer not bound to press for every advantage that might be realized for a client.
      d. Jones v. Barnes, lawyer not bound to raise every nonfrivilous claim.
      e. Rule 1.2(b) a lawyer’s representation of a client does not constitute an endorsement of the client’s political, economic, social or moral views or activities.
   2. The Client’s autonomy
      a. certain decisions belong to clients.
      b. Rule 1.2(a)
         1. objectives of representation
         2. means by which they are to be pursued
         3. decision whether to accept an offer
         4. in criminal cases, whether to accept a plea, whether to waive jury trial, or whether the client will testify.

D. Terminating the Attorney-Client Relationship
   1. Termination by the Client
      a. Client can terminate at any time, for any reason or no reason
      b. Comment 4-6, Rule 1.16
   2. Termination by the Attorney
      a. Rule 1.16(a) Mandatory Withdrawal
         1. See Comments 2-3
      b. Rule 1.16(b) Optional Withdrawal
         1. See Comments 7-8
   3. Assisting client upon termination
      a. Comments 9-10;
      b. no matter how terminated, lawyer must take reasonable steps to mitigate the consequences to the client.

E. Protecting the Attorney-Client Relationship against outside interference
   1. Communicating with another lawyer’s clients
      a. Rule 4.2: can’t communicate with another lawyer’s client about the subject of representation unless consent of the other lawyer or authorized by law to do so
         1. elements
            a. communication must occur while the lawyer is “representing a client” -- this allows a client that is dissatisfied w/ a lawyer to shop around
            b. communicating lawyer must know that the person is represented by another lawyer on the subject of the communication
               1. Comment [5]: knowledge can be inferred from “circumstances where there is substantial reason to believe that the person . . . is represented.”
               2. if person is unrepresented, lawyer must follow Rule 4.3
            c. communicating lawyer is only forbidden to communicate about the
“subject” of other lawyer’s representation.
d. prohibition doesn’t apply if other lawyer consents or if “authorized by law”

2. Note: a violation occurs if a lawyer engages in the forbidden communication through a third party, such as an investigator or even the lawyer’s own client.

b. Civil Matters

1. Individuals
   a. easy to know who is represented
   b. for class actions all members of class are represented by class attny.

2. Corporations
   a. hard question: what employees of a corp. are considered persons represented by the corp.’s attorney?
      1. Comment [4], Rule 4.2 limits to “persons having managerial responsibility on behalf of the org.,” and “person whose acts or omissions in connection w/ that matter may be imputed to the org for purposes of liability or whose statement may constitute an admission on the part of the org.
      2. Code has similar note
      3. Some jurisdictions prohibit communication on any subject w/in a current employee’s scope of employment.

3. Government as adversary
   a. Does rule forbid communication w/ gov’t empl. when opponent is gov’t?
      1. Comment [1] to Rule 4.2 lists right to speak w/ gov’t officials as a communication “authorized by law.”
      2. Various states have similar rules (Calif., N.Y.)

c. Criminal Matters

2. Dilemma: Sixth Amend. prohibits state from questioning, outside the presence of counsel, a defendant against who “judicial proceedings have been initiated.” What if a person is merely under investigation but state knows person is represented by counsel?
   a. still ongoing debate

2. Improper acquisition of confidential information
   a. lawyer may not try to learn an opposing side’s confidential info in other ways
      1. examples:
         a. communication w/ opposition’s experts
            1. ABA Opinion concludes that the MR don’t explicitly prohibit contact w/ an opposing party’s expert but a court’s rules might, in which case contact violates Rule 3.4(c).
         b. knowingly receiving confidential info. from a third person
      2. Remedy/ Punishment
         a. disqualification of attny.
         b. suppression of the evidence
         c. dismissal of claims, esp. where litigant is a participant in the invasion of the opponent’s confidential relationship.

b. lawyer’s responsibility when she receives confidential info that opposing side accidentally sent
   1. ABA Opinion concluded that a lawyer who mistakenly received an opponent’s confidential info should not examine it but should instead request the opponent’s instructions.
2. Courts have repeatedly refused to view the unintended revelation of privileged documents (marked as such) as a waiver.

c. Criminal Cases
   1. What, if any, remedy might a crim. defendant win if he can show that he prosecution has improperly obtained confidential info. from the defense?
   2. S.Ct. denied cert on the issue.

3. Other Rules
   a. Rule 1.7(b) Forbids a lawyer to represent a client if the representation “may be materially limited by the lawyer’s responsibilities to another client or to a third person”
   b. Rules 1.8(f) and 5.4(c) permit lawyers to accept payment from one person to represent another but cautions the lawyer against intrusion on the professional relationship.

II. Financing Legal Services
A. Fees and Billing
   1. Types of legal fee arrangements
      a. hourly billing (fee/hr.); probably most common
      b. flat rate
      c. retainer (pay yearly salary for availability)
      d. contingency fee (only pay if win; typical = 1/3 of award)
      e. fee-shifting statutes (opposing party pays if successful)
      f. court appointed
   2. The Role of the Marketplace
      a. Market place does not contain legal fees
      b. Therefore, Brobeck Ct. look to unconscionability to determine if fee is excessive
         1. factors: equal bargaining power, reasonable agreement?
   3. Unethical Fees
      a. Rule 1.5
         (a) lawyer’s fees shall be reasonable; list 8 factors
         (b) fee shall be communicated to client, preferably in writing
         (c) fee may be contingent, except where prohibited by (d) or by law
         (d) prohibition on contingent fees for divorce or criminal defense cases
            1. Client ability to pay not taken into account
      b. Bushman, held fees “so exorbitant and wholly disproportionate to the services rendered . . . as to shock the conscience.
      c. Fordham, fee for time spent in excess of hours that a prudent experienced lawyer would have spent is unethical; bad faith and overreaching need not be shown
      d. Remedy:
         1. discipline
         2. Courts may order reduction of the fee or deny the fee altogether
            a. discourage from repeating b/c a flagrant violation of fiduciary duty
            b. courts especially strict in reviewing post-retainer fee arrangements
   4. Nonrefundable fees
      a. Matter of Cooperman (N.Y), can’t have specific non-refundable retainer attached to a service; must use general retainers, which can be non-refundable
      b. Some states do not ban specific non-refundable retainers
   5. Contingent fees and Statutory limits
a. Cost/ Benefit of Contingency fees:
   1. Risk of creating a conflict of interest b/c personal interest in a high award
      -- Rule 1.8(j)
   2. Benefits: clients that can’t afford to pay could get representation
b. Statutory Fee Ceilings
   1. several challenges to such laws have been unsuccessful
   2. should client be able to waive statutory ceiling
c. Prohibitions on contingency fees, Rule 1.5(d)
   1. domestic relation matters
   2. criminal defense cases

B. Issues affecting under-resourced litigants
1. Settlements conditioned on fee waiver
   a. under Fees Act, court may allow reasonable attny. fees to be awarded in C.R. cases
   b. Evans v. Jeff D. (S.Ct.), a civil rights case settled by a consent decree providing
      that the defendant shall no pay prevailing party’s fees or costs
      1. Maj. held OK, fees do not have to be assess to the defendant; opinion criticized
      2. Dissent, common sense opinion: if can be waived, discourage attny form taking
         case and purpose of Fees Act is to encourage attny to take such cases
   c. State reaction:
      1. some states have forbidden settlements which deny fees
      2. others have suggested that [] attny have client promise not to waive fees
2. Pro Bono
   a. another way to finance legal services
   b. Rule 6.1: should aspire to render @ least 50 hours of pro bono work/ yr. (voluntary)
      1. Comment [1]: lawyer’s responsibility to provide pro bono services
      2. Comment [9]: a professional responsibility; an indiv. ethical commitment
   c. Why don’t MR/ states require mandatory pro bono service?

III. Ethics in Advocacy
A. The Adversary System
1. Goals
   a. zealous representation
   b. ethical representation
B. Lawyer’s moral accountability for her clients
   a. Rule 1.2(b): a lawyer’s representation of a client does not constitute an endorsement
C. Truth and Confidences (Client Perjury)
1. Generally
   a. Rule 1.6: can only reveal client info about future crime likely to result in serious
      injury; fraud not enough
   b. Rule 3.3: Candor to the tribunal duties required in (a) only continue to the
      conclusion of the case
   c. Rule 3.4(b): lawyer shall not falsify evid or counsel/assist witness to testify falsely
2. The Unique Dilemma of the Criminal Defense Attorney
   a. Cannot put witness on the stand if “know” he will lie. Rule 3.3(a)(4).
      1. Nix v. Whiteside, 6th A. right to counsel is not violated when an attny refuses
         to cooperate w/ the D in presenting testimony the attny knows to be a lie
         a. D attny had actual knowledge of the lie, 3.3(a)(4) prohibits the evidence
      2. “knows,” “belief” requires actual knowledge, must be sure. See MR
         Terminology Section
a. **People v. Depallo** (N.Y.), if know D going to lie about something, don’t have to know details, can refuse to direct testimony

b. Rule 3.3(c): lawyer has discretion where “reasonably believes” evid. is false.

c. What can do if “know” client will lie and demanding to be put on stand?

1. try to dissuade
2. warn will have to withdraw or if not possible, tell judge
3. **Rule 3.1:** D attny may challenge P case w/out presenting perjured evid, even if know D guilty; P must establish every element of the case.
4. Rule 3.3 Comments 9-10: suggests allow client to give narrative testimony, but rules do not allow this now

-- ABA Opinion also suggests question on issues that won’t elicit perjury

D. Fostering Falsity or Advancing Truth?

1. Cross Examination of the Truthful Witness

   a. Question must be relevant to case; cannot be merely an attempt to degrade

   b. Code states if “reasonable basis to believe” a question is relevant, then can degrade

2. Appeals to Bias

   a. Can’t invite jury to base decision on race, religion, national origin, or similar char.

   b. Not a per se grounds for reversal, look to individual case

   c. Rule not explicit on bias

3. The Boundaries of Proper Argument

   a. Improper Argument

      1. Attny cannot supply facts, opinion, or testify to own character

   b. Arguing for False Inferences

      1. Ways to discredit harmful evidence

      a. impeach evidence/ witness

      b. ask jury to draw inference in you favor, if ambiguous

      2. If know witness/ evidence is truthful, can still try to discredit it?

         a. Prosecutor’s duty: Advance “Truth”; can’t infer something is false if “know” it is true, or vice versa.

         b. D attny duty

            1. Subin: D attny can never argue a false premise; if knows D “guilty,” can only play “monitor” role to assure P meets burden

            2. Mitchell: D attny disagrees, can argue reasonable doubts in P case, even if know false

            3. Fortune: Crim. D attny may argue from testimony that is logically relevant to support an inference that the lawyer knows to be false; may attack P’s version of facts even when knows the version is true.

4. Literal Truth

   a. Definition of “truth” in adversarial system

      1. not always literal truth

      2. Can state “literal truth” but incomplete, misleading answer. **Bronson** (S.Ct.)

   b. What attny must keep in mind

      1. Rule 3.3 Candor to tribunal, always

      2. Rule 3.4. Fairness to opponent; applies to b/f and during trial

5. Coaching

   a. cannot tell client what to say on stand

   b. Witness preparation is ethical and part of good advocacy.

   c. Distinction can be difficult

6. Exploiting Error
a. duty to represent client zealously; can present any evid. that is truthful  
b. Crim D atty not to by client’s judge and jury  
   1. if D discloses error by opponent (i.e. time crime committed), do not have to disclose; interest in full disclosure  
   2. may present any truthful testimony, even if misleads  

7. Silence  
a. Rule 3.3 Candor Toward the Tribunal  
   (a)(2) duty to disclose facts when necessary to avoid assisting a criminal or fraudulent act by client  
   (a)(4) lawyer shall not offer evid that the lawyer knows to be false  
b. Is silence permissible when a lawyer knows that another is laboring under a misimpression that the lawyer did not personally create?  
   1. Silence is okay, so long as doesn’t assist in committing a crime or fraud (Rule 3.3(a)(2)) or offer evid that the attorney knows to be false (Rule 3.3(a)(4))  
   2. Rule 3.3 sometimes requires remedial measure when the lawyer “comes to know” that she has introduced false evid.  
   3. Otherwise, only 3.3(a)(2) would specifically obligate lawyer to speak up to prevent a fraud on the court  
      a. What is assisting? ABA Opinion said can be silence, not limited to crim. def  

E. Frivolous Positions and Abusive Tactics  
1. FRCP 11  
   a. Ct. imposed sanction against lawyers for violations of the Rule  
2. Dilatory Tactics: indirect strategies for gaining legal advantage  
   a. Delay: Rule 3.2 lawyer shall make reasonable efforts to expedite litigation consistent with the interest of the client. (Vague test)  
      1. FRCP 11: can’t “cause unnecessary delay or needless increase cost of litigation  
      2. Lawyers often delay case for other than legit. interest  
   b. Frivolous Suit: Rule 3.1 claim or defense must be non-frivolous  
      1. Comment 2: not frivolous just b/c facts not fully substantiated  
   c. Discovery Request: Rule 3.4 “reasonably diligent effort to comply w/ discovery  
3. Playing Hardball  
   a. opposite of civility  
4. Misstating Facts, Precedent, or the Record  
   a. can argue any inference supported by the record; but can’t assert those inferences as fact b/c can’t argue false facts [Rule 3.3(a)(1) (to judge), Rule 4.1 (to 3rd person)]  
   b. can never mislead judge about law (Rule 3.3(a)(1) and (3)) or record  
5. The Obligation to Reveal Adverse Legal authority  
   a. Rule 3.3(a)(3): must disclose legal in jurisdiction known to be directly adverse to the position of the client and not disclosed by opposing counsel.  
   b. Even if not sure case is “directly adverse,” should cite it and distinguish to be safe  

F. Special Issues in Criminal Advocacy  
1. Distinctions between Prosecutors and Defense Attorneys  
   a. Prosecutors higher duty as “minister of justice”  
      1. subject to constraints and responsibilities that don’t apply to other lawyers  
      2. #1 goal: serve truth and justice, not just to win  
   b. Defense attorneys and the blame the victim defense  
      1. is it zealous representation or ethically wrong?  
      2. some now tactics prohibited by rules of evid., others used all the time still  
2. Dealing with Physical Evidence
a. Destruction of Physical Evidence
   1. *Rule 3.4(a)*: cannot unlawfully obstruct or destroy evidence
   2. In some jurisdictions, spoliation of evidence is a tort
b. Concealment of Physical Evidence
   1. The turnover duty
      a. if the evidence is a fruit or instrumentality of a crime, illegal in itself to possess, lawyer cannot keep the evidence
      b. if the evidence is something ordinary and legal, probably no duty to turn over
   2. Revealing the source
      a. if alter or remove evidence, must reveal source
c. What lawyer can do if receives evidence. ABA Standard.
   1. turn over to authorities if law or court order requires it
      a. if contraband or unreasonable risk of physical harm and no pending case or investigation and wouldn’t violate law: lawyer may suggest client destroy it
   2. return to source; advise source of legal consequences of possess or destruction
   3. If lawyer fears return will lead to destruction of or physical harm to the item or if lawyer plans to test the evidence for defense purpose, may hold in office for a reasonable time, in a manner that does not impede the lawful ability of law enforcement authorities to obtain the item.

IV. Conflicts of Interest
A. General Questions to ask (*Rule 1.7*)
   1. Is there an attorney-client relationship
   2. Is the duty of loyalty compromised? Is there a risk of compromise
   3. Does a conflict exist pre-representation?
      a. if so, (1) can attorney still be loyal?
         (2) will client consent?
   4. Is there a potential for conflict to arise?
      a. if so, when? and (1) can attorney still be loyal and
         (2) will client consent
   5. Is conflict imputed?
B. Concurrent Conflicts: two current conflicts
   1. Client-Lawyer Conflicts
      a. Test for conflict = reasonable client standard; no bright line
      b. *Rule 1.7(b)*: lawyer shall not represent client if rep. may be materially limited by lawyer’s own interests, unless (1) and (2).
      b. *Rule 1.8*:
         (a) lawyer shall not enter into business transaction w/ client unless
            1. fair, fully disclosed in writing in a manner reasonably understood by client
               a. full disclosure = detailed list risks/ advantages, and divergent interests
            2. advise to seek independent counsel
            3. client consents in writing
         (e) lawyer shall not provide financial assistance to a client in connection w/ pending or contemplated litigation, except may pay/ advance court costs and expenses of litigation.
         (f) lawyer may only accept payment for services from a third person if
            1. client consents after consultation:
            2. no interference w/ L’s indep. prof. judgment, 5.4(c), or A-C Relationship; &
            3. info. relating to representation is protected as required by Rule 1.6.
1. Rule quite protective of clients; includes pecuniary interests

b. The Advocate-Witness Rule

1. **Rule 3.7**

(a) lawyer may not act as advocate at a trial in which the lawyer is *likely to be a necessary witness* except where:
   1. testimony relates to an uncontested issue;
   2. testimony relates to nature & value of legal services rendered in case; or
   3. disqualification of the lawyer would work substantial hardship on client

(b) lawyer may act as advocate in a trial in which another lawyer in the firm is likely to called as a witness unless precluded by Rule 1.7 or 1.9.

1. **Rule 1.7**: if will have to cross examine a partner, client’s representation could be adversely affected.
2. **Rule 1.9**: successive conflicts rule
3. contradicts w/ imputed conflict rule [1.10(a)]: no attny in firm may represent if any one attny in firm cannot?

1. Rule is strict, b/c only “likely to be called,” but lenient b/c only applies to lawyer, not firm

2. Client-Client Conflicts

a. **Criminal Cases**

1. Defense Attorneys
   a. Ways conflicts arise:
      1. D deprived on opportunity to be represented by attny of choice
      2. D convicted and on appeal argues conflict of interest
   b. **6th A.** right to effective assistance of counsel issues:
      1. **Cuyler** (S.Ct): attny represents multiple D’s charged in same crime.
         a. trial ct. no duty to inquire into propriety of representing multiple D’s
            1. burden on D; cts. only have duty to investigate timely objections
            2. Brennan, Marshall dissented: tr. ct. must determine that the joint representation is the product of D’s informed choice.
         b. mere possibility of conflict not enough to prove ineffective assist.
            1. Test: if D can show there was conflict “adversely affecting” the client’s interest, than doesn’t have to show prejudice
            2. Marshall dis.: test is harsh, adverse affect no diff from prejudice.
      2. **Butterworth** (11th Cir.): firm represented D, but had prior relationship w/ co-D; didn’t intro. evid tending to show that co-D more responsible.
         a. IAC found based on conflict
         b. Criticizes tr. ct. and D attny; but, what about prosecutor?
      3. **Wheat**, (S.Ct): D consent to representation and waiver of right to conflict-free counsel is not enough. (P obj. to conflict day b/f trial)
         a. Rule 1.7, consent not enough; attny must 1st reasonably believe that representation will not be adversely affected
         b. Standard: when presumption in favor of counsel of choice overcome by actual or serious potential for conflict, ct can decline D waiver and order new counsel
            1. interests of tr. ct.: interest in crim. trials conducted ethically, instit. interest in just trial, and need for proceeding to appear fair.
            c. Marshall, Brennan dissent: standard too speculative

2. Prosecutors
   a. How conflicts arise:
1. lack of objectivity
   a. P must be neutral, but doesn’t mean Special P can’t be used
   b. cannot be paid more for successful convictions
   c. may not represent the V in a civil case while prosecution pending

b. Civil Cases
   1. Duty of loyalty, Comment 2 to 1.7: cannot represent a party if would violate
duty of loyalty to existing client, even if not a related matter
   a. Fiandaca, P.I. group represent 2 diff. classes in separate suits against
state; rejected state offer b/c adverse to other class suit
      1. Conflict under Rule 1.7(b), attny needs to get consent from both and
reasonably believe representation won’t be adversely affected
(also found D did not inject the conflict to delay the trial)
      2. Remedy: refuses new tr b/c would have gone to tr anyway; remands
for reconsideration of award to P
   b. IBM v. Levin: may not act adversely to client even on an unrelated matter.
is the rule always good? Could negate business for big firm
   a. some argue, should be per se rule against such client, but can be
rebutted if reasonable
   b. ct. said must avoid appearance of impropriety, even if no prejudice
   c. Exception: Waiver, but will depend on sophistication of client

c. Who should have standing to bring conflict motion?
   1. some cts say only client has standing
   2. some grant non-parties standing b/c need to know if attny violate ethics
   3. others say non-clients only have standing if rights prejudiced

2. Multiple Representation
   a. Privilege
      1. neither client may exercise A-C privilege in a later controversy b/t them
      2. no party to multiple representation may waive privilege w/out consent
         of all others
   b. Conflicts
      1. b/t duty of confidentiality and duty of loyalty and duty to inform
      2. class conflicts: interests of class members must be similar

3. Insurance triangle
   a. duty to defend: if possibility will have to indemnify, must hire separate
counsel for insured

4. Remedy for conflict
   a. Disqualification
   b. Discipline
   c. Malpractice suit
      1. 1st step: is there an attny client relationship; can be based on reliance
      2. can’t really separate conflict from negligence

C. Successive Conflicts: conflict based on past client interest w/ present client interest
   1. Private Practice (switching sides)
      a. successive duty of loyalty; duty remains after representation
         1. Rule 1.9(a): the substantial relationship test
         2. Rule 1.9(c): can’t use info. to disadvantage former client
      b. successive conflicts may sometimes be waived, Rule 1.9(a)
   2. Imputed Disqualification and the Migratory Lawyer
      a. Rule 1.10: conflicts follow lawyer and bind new firm
1. MR do not permit screens if lawyers change firms, but do if gov’t lawyer enters private practice
2. Lawyer disqualified will impute to new firm if:
   a. subject of representation has a “substantial relationship” to prior represent.
   b. interests are materially adverse
   c. lawyer had acquired confidential info. that is material to the case
3. Migratory Lawyer disqualification will not impute to new firm where:
   a. disqualified solely b/c a surviving duty of loyalty, but no confidences at risk
      -- Comment [10], Rule 1.9.
4. Removing conflicts from former firms
   a. Rule 1.10(b):
   b. Rebutting the Presumption of Conflicts
      1. Presumption that the migratory atty had knowledge of confidences of a client of his former firm
         a. This presumption is rebuttable by evid. of non access to work
      2. Presumption that is #1, the lawyers at the new firm received those confidences.
         a. Under MR, not rebuttable; if atty had access to info, entire new firm will be disqualified
         b. some courts allow rebuttal by screens
   c. Nonlawyer Conflicts
      1. nonlawyer assistants can also carry confidential info, but screens tolerated more
      2. summer associates: some cts apply successive conflict rules to them
      3. Expert witnesses: can lead to disqualification if interview expert w/ info.
3. Government Lawyers and the Revolving Door
   a. Rule 1.11(a): Where gov’t atty leaves gov’t and enters private practice, conflicts can be imputed to law firm unless certain conditions met, MR allow screens
   1. lawyer may not represent a private client if participated as a gov’t employee, unless gov’t agency consents
      a. Comment 2 to Rule 1.11: statues and regs may curtail extent to which gov’t agency may consent
   2. other atty at firm may represent if appropriate screens and written notice given to gov’t agency; but no screen needed if gov’t consents
   b. Rule 1.11(b): lawyer having info known to be confidential gov’t info about person acquired while at gov’t agency may not represent a private client in a matter where the info could be used to the material disadvantage of that person.
      1. however, firm is not disqualified, may screen lawyer
      2. cannot consent to this type of disclosure
   c. Rule 1.11(c): lawyer going from private practice to gov’t may not participate in a matter in which
5. Lawyers for Entities
   A. Conflicts and Confidentiality in Entity Representation
      1. Rule 1.13(a)
   B. Retaliatory Discharge and Whistleblowing
      1. retaliatory discharge claims threaten a client’s confidential info, but Rule 1.6(b)(2) permit lawyers to use client confidences “to establish a claim or defense . . .”
      2. ethics rules forbid whistleblowing outside the org.; can only do so if falls in 1.6(b)(1)
6. Ethics in Negotiation and Transactional Matters
   A. General Attorney Role
      1. goals: get something for the least cost, best deal; but must do it ethically;
2. Ethics: cannot assist a client in conduct that is criminal or fraudulent. Rule 1.2(d)
   a. but, when crim or fraudulent act against a third person -- as opposed to the court,
      Rule 3.3(a)-- lawyer’s duty to take corrective action to avoid assisting is
      subordinate to Rule 1.6 (confidentiality)
   b. If atty knows, representation constitutes assisting, a violation of Rule 1.2(d)

B. Noisy Withdrawal
1. **Rule 1.16(a)(1):** lawyer shall w/draw if representing will violate rules of prof conduct
2. In addition to withdraw, can attorney also disaffirm her work (Noisy Withdraw),
   which, in effect, reveals the fraudulent act?
   a. Rule 1.6 does not allow atty to reveal the fraud; not one of the exceptions
   b. Comment [16], Rule 1.6 says can w/draw and disaffirm (not mentioned in 1.16).
   c. How is noisy withdraw different from revealing confidences?
      1. level of detail less in noisy withdraw
   d. ABA considered making fraud an exception to 1.6, but rejected it; Noisy withdraw
      gets lawyers around the confidentiality rules
         -- self serving b/c lawyer could be sued for fraud
3. **Rule 1.16(b)(1) and (2):** Permissive Withdraw

C. Negotiating Settlements in Litigation
1. Try to settle b/f filing a claim
2. Duty of candor to court
   a. **Virzi,** mediation over personal injury claim, parties agree; P dies b/f agreement
      goes to judge, atty does not tell opposing counsel or judge until after approved
      1. should have told judge, but duty to opposing counsel is “a more difficult
         judgment call”
3. **Rule 4.1, Comment [1]:** no affirmative duty to inform opposing counsel of relevant fact

VII. Regulation of Lawyers Speech
A. Free Speech Rights of Lawyers
1. Public Comment about pending case
   a. lawyers speech limited during on-going litigation (gag orders)
   b. **Rule 3.6(c):** lawyer may respond to protect client form substantial undue
      prejudicial effect of recent publicity; can’t do it to influence potential jurors
   c. risk of defamation action
2. Criticizing the administration of justice
   a. must be in a professional and civil tone
   b. maybe okay if a one-time incident
3. Criticizing particular judges
   a. **Rule 8.2(a):** must make reasonable effort to determine truthfulness b/f criticize
   b. don’t follow constitutional malice test; issue is whether adversely affects
      administration of justice

B. Marketing Legal Services
1. Advertising and In-Person Solicitation
   a. Print ads may not be prohibited, constitutionally
      1. Bates, S.Ct. invalidated blanket prohibition on print ads
      2. **Rule 7.2:** lawyer may advertise through public media
   b. **Ohralik,** no in-person solicitation
      1. don’t need evid. person harmed by the solicitation
      2. conflict of interest; atty pecuniary interest
      3. high risk attny may influence lay person b/c attny trained in art of persuasion
a. factors: sophistication of potential client; actual tactics used
4. although S.Ct. seems to say all in-person solicitation can be prohibited, restricted by Edenfield: not applied to an accountant
c. Rule 7.1: requirements for legal ads
d. Rule 7.3: forbids lawyer to solicit professional employment by in-person solicitation or by telephone
-- Rule 8.4(a) would forbid a lawyer to do it through the acts of another
d. Rule 7.3(b)(2) forbids any solicitation that is coercive, under duress or harassment
2. Targeted Advertisements
a. commercial speech afforded less constitutional protection than trad. speech;
-- state may regulate if a compelling interest, narrowly tailored, and no less onerous means (strict scrutiny test)
b. Dalkon Shield: state cannot prohibit ad regarding specific legal prob. or illustrations in ads; ct. upheld requirement of full disclosure of contingent fee terms
3. Targeted Mail
a. Shapero, mail sent to indiv whose houses being foreclosed upon, S.Ct said okay
b. ABA changed Rule 7.3 to permit targeted mail, but “Advertising Material” must be stamped on it
4. Claims of Special Expertise
a. Peel, led to private accreditation efforts
b. now reflected in Rule 7.4(c)
5. Solicitation by Public Interest and Class Action Lawyers
a. less risk of conflict of interest b/c no pecuniary interest
1. In re Primus, ACLU not prohibited from calling an indiv to seek representation b/c motive is not pecuniary gain, 7.3(a), but still restricted by 7.1 and 7.3(b)(2)
a. Rehnquist says should look to conduct, not motive
2. risk of subordinating client interest to goal of the org, but lack of pecuniary interest outweighs this concern
3. Rules presume that if $ involved, coercion creeps in
b. 1st amend provides more protection where trying to achieve political/ social obj. NAACP v. Button.

VIII. Lawyer Professionalism
A. Where do Rules regulating Lawyers come from?
1. Constitution
2. Statutes
3. Procedural Rules (Ct. rules)
4. State Bar association Rules
   a. Most based on ABA Model Rules or Model Code; states adopt parts
      1. Maj. have adopted Rules, incl. MO
      2. Min. have adopted Code
   b. Courts apply and interpret them
B. Self-Regulation and Sanctions
1. Supervisory Responsibility
   a. Rule 5.1(a) and (b): duty to ensure other lawyers under your supervision conform
      1. can be disciplined even if unaware of other lawyer’s misconduct
   b. Rule 5.1(c)(2) duty to act to avoid or mitigate another’s violation if know or should have known of violation
   c. attny liable even if act at direction of a supervisory attny; if subordinate, liable
unless reasonably believed the supervisor had resolved the issue of ethics

2. Malpractice and Breach of Fiduciary Duty
   a. Proving Malpractice
      1. Elements
         a. attorney-client exists
            1. Togstad, client, even though no $ and only met for one hour; attorney said no malpractice case, didn’t advise of s.of.l; D relied on attorney, sol ran out -- A-C relationship exists where attorney does not qualify advice
            2. non-client can sue if relied to detriment, but broader duty to client
         b. D acted negligently or in Br. of K
            1. expert opinion on standard practice in the field
            2. duty to tell potential client about s.o.l.
            3. attorney should do research if going to give advice, otherwise, don’t give advice, just refer to someone else; put disclaimer in writing.
            4. violation of fiduciary duty can also lead to malpractice if (c) and (d)
         c. such acts were proximate cause of P damages
         d. but for conduct, P would have been successful in prosecution of claim
   b. Causation in Criminal Cases
      1. should not benefit from crim activity, so D cannot recover on malpractice case unless exonerated; option of ineffective assistance of counsel
   c. Damages and Injury
      1. draws from law of remedies in tort and contract actions
      2. reluctance to allow recovery on non-economic injury
      3. question whether recovery ought to be reduced by fee attorney would have received if had not acted negligently and whether ought to be increased by amt. paid to new lawyer to bring malpractice claim

C. Discipline
   1. Purposes of Discipline
      a. vindicate society, deter non-professional conduct
   2. Types of discipline/ sanctions’
      a. disbarment
      b. suspend practice
      c. censure
      d. admonition
      e. warning/caution
      f. reprimand
   3. Acts justifying discipline
      a. attorney taking client $$ w/out authorization, violates Rule 1.15(a)
         1. In re Warhaftic, disbarred
      b. dishonest lawyers:
         1. don’t inflate billables
         2. don’t seek false compensation for expenses
         3. don’t lie on resume
      c. neglect of client matters
         1. chief reason lawyers disciplined
      d. lack of candor
      e. lawyer’s private crim. acts can lead to professional discipline
      f. racist and sexist comments
         1. less harshly punished than rules dealing w/ client trust
4. Duty to Report another lawyer’s misconduct
   a. MR 8.3 “Squealer Rule”: lawyer having knowledge of other lawyer’s violation is required to inform authorities
      1. underenforced; may hurt reputation to squeal
      2. what “knowledge” required?

5. Frequently cited grounds or delaying/denying admission to the bar
   a. Rule 8.1: cannot make false statement of material fact on application to the bar