I. Introduction and Background
   a. Failure to Report Another Lawyer’s Misconduct
      i. Reporting Professional Misconduct – Rule 8.3- a lawyer having knowledge that another lawyer has committed a violation of the Code that raises a **substantial question** as to that lawyer’s honesty, as a lawyer in other respects, **shall** inform the appropriate professional authority. *RAT OUT YOUR FRIENDS!!!*

      1. **Important to Self-Regulation** – this is an obligation based on lawyer self regulation, the comment notes that it is particularly important where the victim of the conduct may not become aware of it.

      2. **Definition of “Substantial”** – is defined by the comment as referring to the seriousness of the offense and not the evidence of which the lawyer is aware.

      3. **Subject to Client Privilege** – by the comment, lawyers are not required to report the violations of their clients who are lawyers, and therefore protected by Rule 1.6.

   b. Elements of the Client-Lawyer Relationship
      i. Competence
         1. **Competence – Rule 1.1** – the rule provides that a lawyer **shall** provide competent representation to a client – the required elements of such representation is *knowledge, skill, thoroughness and preparation*. This rule does not require a pattern of misconduct to be violated, but only a single violation

         2. **Legal Knowledge & Skill**- a lawyer must have the knowledge a skill to handle a case – the rules note that competence is to be presumed and allow competence to be established through preparation or association – thus incompetence is often only a result of failure to seek it.

            a. **Factors in Determining Necessary Skill**- the rule enumerates several factors to be used by lawyer/board to determine if he/she is competent to handle a matter:

               i. Relative Complexity or Specialized Nature of Representation
               ii. General Experience of Lawyer-
               iii. Training in a Specific Field-
               iv. Preparation & Study of Lawyer-
               v. Ability to Refer Matter
               vi. Ability to Consult Other Lawyer

         ii. Confidentiality

            1. Case of Karen Doe, Perez v. Kirk & Carrigan (p.29)

            2. **Confidentiality – Rule 1.6**- A lawyer **shall not** reveal information relating to representation of a client unless the
client consents after consultation, except for disclosures that are implicitly authorized in order to carry out the representation. *Note that this rule is much broader than the Attorney-Client Privilege Evidentiary Rule.*

a. **Exceptions to Rule**—the rule has a couple of qualified exceptions, under this situation a lawyer *may* reveal a client confidence:
   i. **Future Criminal Act**—to prevent a client from committing a criminal act that the lawyer believes likely to result in *imminent death or great bodily harm*. However, the lawyer should first attempt to dissuade the client from the course of action.
      1. *reasonable belief*—definitions—lawyer of reasonable prudence and competence would ascertain the matter in question
   2. **Inquiries:**
      a. Is person a client?
      b. Does he think he is a client?
      c. Jurisdiction?
      d. Is what was said confidential?
   3. **RULE CHANGES:**
      a. Does not have to be criminal
         i. Prod. liab. ok
      b. Does not have to be imminent
      ii. *Establish/Defend Claim Against Client*—such a fee collection, etc.
         1. 
      iii. *Defend against charge/claim based on conduct on behalf of client*—in order to clear the lawyer’s name in suits involving fraud etc. The claim need not be actually filed, but merely threatened by a third party. Confidences should only be revealed to the point necessary to exonerate the lawyer.
   iv. **Compelled by Court Order**—where a competent court requires disclosure of information, such an order trumps the rule. (Comment 19)
   v. **MR 3.3**—must reveal to tribunal or judge to avoid assisting a criminal or fraudulent act by the client
1. **MR 4.1** – do not have to reveal to 3rd person – *even if fraud*

b. **Authorized Disclosures**- a lawyer may be authorized by the client to make certain disclosures of otherwise confidential facts – this authority may be explicit or implicit. Additionally, a lawyer may discuss confidential information with other members of the firm, unless otherwise instructed by the client.

c. **Continues After Termination of Relationship** – note that duty of confidentiality continues even after the termination of the relationship.

   i. *Even where Withdrawal Compelled* – even where the lawyer was compelled to withdraw based on client’s illegal actions – the lawyer must still not reveal any client confidences.

d. **Comment 5** – observations are probably privileged

e. **Reporting is voluntary** (some states *must* report!!)

3. **Lawyers for Entities**

   a. **Organizational Clients – Rule 1.13** – a lawyer employed by an organization is subject to control by its duly authorized constituents. (sub A)

   b. **Duty Organization, Not Officers (Sub B)**- a lawyer *shall* proceed in the best interests of the organization if he knows an officer, etc. of an organization (who controls him under A) is acting inappropriately to the best interest of the organization. The lawyer is to consider a number of factor (such procedures of organization and impact, etc.) in determining his action. Such measures may include: (*atty. must KNOW* – violation of law or obligation to organization)

   i. Asking for reconsideration of a matter

   ii. Advising that a separate legal opinion on the matter be sought

   iii. Referring the matter to higher authority, in serious issues the highest authority- of the organization.

   c. **May Withdraw if Insists (sub C)** – if a lawyer attempts to prevent action he sees as clearly a violation of law and likely to injure the organization, he may withdraw pursuant to 1.16.

   d. **Must explain Organization as Client to Officers (sub D)**– in dealing with an organizations
constituents, a lawyer shall explain the identity of the client when it is apparent that the organization’s interest are adverse to those of whom he is dealing.

e. **May Represent Director, etc. (sub e)** – a lawyer may represent an organization and its directors in a matter where there is no conflict of interest as prohibited in rule 1.7. The organization may consent to dual representation where consent is given by the proper authority. This is particular issue in derivative suits. (Comment 10, 11)

f. **Confidences with Organizations** – while the employees of an organization are considered to be part of the client and therefore protected from outsiders by 1.6; *statements by employees are not protected from being used by the organization against the employee, since the lawyer is not the employee’s lawyer, but the organization’s.* Additionally, the lawyer cannot disclose confidences of the organization to an employee w/o authorization (comment 2). *This should be explained to the individual.* (comment 7, 8)

g. **Governmental Agencies** – a lawyer’s client in the government context may be considered to be the entire government rather than a specific agency, additionally a government lawyer may have a greater duty to question the actions of officials. (Comment 6)

h. **Upjohn v. U.S.** – (p. 33) – corp. atty. sent questionnaires to ‘ees, gov. tried to subpoena the forms

i. **Ct. of App.** – control group test – only those high up have privilege

   1. like having no privilege

ii. **Sup. Ct.** – *subject matter test – privilege when speaking to any ’ee if subject matter could impute liability to the corp., ’ee must be acting in the scope of employment*

i. **MR 3.4(f)** – corp. atty. can *ask an ’ee not to speak to opposing counsel, ’ee can voluntarily speak though*

j. **Samaritan Found. V. Goodfarb** – (p. 37) – corp. atty. had ’ee witness sign agreement to be represented by corp. attys., atty. interviewed ‘ees and P wanted the forms

i. **Ct.** – rejected control group and part of subject matter test
ii. **TEST:** Functional Test – communication initiated by ‘ee to corp. counsel concerning ‘ee’s own conduct w/in scope of employment is privileged
   1. excludes witnesses
   2. less protection than Upjohn

iii. **OVERRULED BY LEGISLATION**
   1. privilege if getting info:
      a. for purpose of providing legal advice to corp. or ‘ee
      b. for purpose of obtaining info to provide legal advice to corp.
   2. BROAD – like s/m test – Upjohn

iii. **Agency**
   1. Taylor v. Illinois – b/c of atty. mistake client could not have testimony of a witness (6th Amend.)
      a. Ct. – maj. - client must accept consequences of atty. decisions
      b. MR 1.2 (comment 1) – lawyer and client should consult on ends of representation, lawyer has more power to decide means to get to end???
         i. Failure to identify client – means
   2. Cotto v. U.S. – atty. did not really try the case, let it sit, lots of mistakes (civil)
      a. Only leaves the client w/ a civil malpractice claim
   3. vicarious admissions – atty. through vicarious admission can bind the client (press, negotiations, ct., etc.)

iv. **Fiduciary** – if atty. is negligent – must reveal it to the client
   1. watch out for self-dealing, divided loyalty, secret competition w/ client

v. **Attorney Duties**
   1. Loyalty and diligence
      a. Loyalty – survives after end of atty.-client relationship (confidentialty – MR 1.6)
      b. Diligence – represent client zealously, pursue clients interests w/o undue delay
   2. Inform & Advise
      a. Nichols v. Keller – atty. did not tell client about 3rd party action, was only retained for worker’s comp. claim, S/O/L ran on 3rd party claim when client learned of its existence
         i. Should atty. have to tell client about other possible claims?
1. **YES -tension with MR 1.2(c) - Limit on Services/Scope of Representation (sub. C)-** a lawyer may after initial consultation limit the scope of his representation of a client to certain matters- if the client consents. Terms of representation may represent limits on scope or objectives of the representation. The agreement may exclude objectives that the lawyer find repugnant or imprudent.

3. **The Client’s Right to Know**
   
a. **Communication – Rule 1.4-** the duty to communicate has two separate provisions – a lawyer must keep a client reasonably informed of the status of a matter; must comply with requests for information; additionally a lawyer is required to explain any information to allow the client to make an informed decision. Therefore a lawyer communication must be appropriate based on a client’s ability to comprehend.

   i. **Settlement/Plea Offers-** a lawyer has a duty to inform his client promptly of settlement/plea offers unless the client has made it clear the proposed settlement would be unacceptable.

   ii. **Trial/Negotiation Strategies-** a lawyer should explain the general strategies that will be pursued by him in a representation, however, it is not required that the lawyer explain in great detail the specifics but should fulfill reasonable client expectations of information.

   iii. **Practicality of Communication-** where a lawyer is representing an organization, his duty may be fulfilled by communicating with designated contact person(s), rather than the organization as a whole, additionally, where a lawyer is representing a continuing matter(s) etc. – a system of limited or occasional reporting may be adopted.

   iv. **Withholding Information-** in limited circumstances a lawyer may withhold information for a client where he would be
likely to react imprudently to an immediate communication. A lawyer may not withhold information for personal interest or convenience. Additionally non-disclosure may be compelled by court order.

c. Autonomy of Attorneys and Clients
   i. Lawyer’s Autonomy
      1. Jones v. Barnes – on appeal (client convicted), atty. appointed, did not raise all of claims the client suggested on appeal, atty. felt certain issues would be best – not all of them, client submitted pro se brief, client lost appeal
         a. Sup. Ct. – atty. should use own judgment, does not have to raise every issue (may bury the important issues)
            i. Based on past experience/professionalism
   ii. Client’s Autonomy
      1. Certain decisions belong to the client
      2. Scope of Representation – Rule 1.2- this rule governs the general limits on what a lawyer may do as his client’s representative. Specifically the rules establishes limits on a lawyer’s conduct on his client’s behalf and establishes what decisions he may make on a client’s behalf.
         a. Decisions for the Client- a lawyer is to defer to the client on matters that determine the objectives of the lawsuit/representation – specifically, the following are the exclusive decision of the client and not the lawyer (Subsection A of 1.2):
            i. Filing Suit
            ii. Accept Settlement Offer
            iii. Testify in Criminal Trial
            iv. Plead Guilty
            v. Jury or Bench Trial
            vi. Appeal of Decision
            vii. Monetary Limits- a client may also instruct a lawyer not to depose someone or follow certain procedures on the basis that they will cost more than they are willing to pay – i.e. lawyers don’t have a blank check.
            viii. 3rd Person’s Wellbeing- a lawyer should also defer to a clients whishes where they feel being called as a witness or being deposed, etc. may be detrimental to a clients wellbeing.
      b. Decisions for the Lawyer- generally procedural decisions of how to proceed in a lawsuit are the
province of a lawyer – and the lawyer has the power
to make the following decisions without consulting
the client:
   i. Court to File in-
   ii. Depositions-
   iii. Discovery Requests-
   iv. Continuances-

d. Terminating the Attorney-Client Relationship
   i. Client can always fire you
      1. harder if client is indigent or close to trial date
   ii. Termination by Attorney
      1. Declining or Terminating Representation – Rule 1.16 –
         a. Lawyer shall not represent a client & must
            withdraw where (sub A) except where ordered by
            the court:
               i. Representation would Violate Code
               ii. Lawyer’s Physical or Mental Condition
                   Impair ability
               iii. Lawyer is Discharged by Client- a lawyer is
                    terminable at will by the client, however, a
                    client may be prevented from discharging an
                    appointed counsel (comment 4, 5), if clients
                    mental condition is at issue, may have to
                    seek a conservator pursuant to 1.14.
         b. A Lawyer May Withdraw (sub B)– unless ordered
            by the court where:
               i. Withdraw can be accomplished without
                  material adverse effect on client.
               ii. Client persist in a course of action where
                   lawyer reasonably believes services will be
                   used in criminal or fraudulent manner.
               iii. Client has used lawyer’s services to
                   perpetrate a crime or fraud
               iv. Client insist on pursuing an objective that is
                   repugnant or imprudent to lawyer
               v. Client fails substantially to fulfill an
                   obligation the lawyer regarding services-
                   and the client has been give reasonable
                   warning that services would be withdrawn
                   unless obligation was fulfilled. Generally
                   this is not paying his tab.
               vi. Representation will result in unreasonable
                   financial burden
               vii. Other good cause
c. **Must Follow Court order to continue (Sub C)** - when ordered by a tribunal, a lawyer shall continue representation irrespective of other good cause.

d. **Still Subject To Confidentiality** - Comment 2 notes that a lawyer must not reveal client confidences in order to explain his withdraw to a tribunal, but should only sight generally that he must withdraw or violate the code.

II. Protecting the Client-Lawyer Relationship Against Outside Intereference

a. Communicating w/ Another Lawyer’s Clients

   i. **Communication w/Person Represented by Counsel – Rule 4.2** – in the representation of a client, a lawyer **shall not** about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or authorized by law. This includes matters relating to any negotiation or adjudicative proceeding.

   “Jo, you ever talk to one of my clients again, I’ll have you disbarred. Friends?”

   1. **Communications not prohibited** - a comment to the rule notes that several forms of communication are not prohibited:

      a. rule does not prevent lawyer from talking to a represented person about some unrelated matter
      b. Does not prevent the client from talking to a represented person directly.
      c. Does not prevent from talking to unrepresented 3rd party witness
      d. Lawyer may have a statutory right to talk to government official even where government is opponent.

   2. **Organization = Agents & Managers** – the comment notes for purposes of representing organizations, the **rule will be applied** to any managerial authority or any person capable of conduct to be imputed to the organization or of making a statement that could serve as an admission against the organization. However, if that person is represented by separate council, only their consent is necessary.

   3. **Must Have Actual Knowledge** – in order for a lawyer to be subject to this rule, he must be **actually** aware that is represented on the matter, however the comment notes that such awareness may be inferred from the circumstances.

   ii. A victim of a crime is not a client of the state – prosecutor cannot ask victim not to talk to defense counsel – **MR 3.4**

   iii. Client can shop around by talking to lawyers who are not involved
b. **Civil Matters**
   i. **Niesig v. Team I** – Are ‘ees of a corp. party also considered clients?
      1. **MR 4.2 (comment 4)** – if act in managerial capacity or acts can be imputed = client
      2. does not distinguish b/w current and former ‘ees
      3. **See MR 3.4(f)** – rejects ct’s. blanket test

c. **Criminal Matters**
   i. **Texas v. Cobb** – D out on bond for burglary – still pending (represented), confessed to murders (still uncharged, w/o atty.)
      1. **Sup. Ct.** – 6th Amendment right exists only for **charged crimes**, no exception for “factually related” uncharged crimes
         a. Crimes must be exactly alike!!!
         b. Here, different crimes so confession is ok, no right to counsel
   ii. **What about MR 4.2?**

III. **Financing Legal Services**
   a. **General Background**
      i. Types of fee arrangements
         1. contingency (1/3 of recovery – civil cases)
         2. hours billed
         3. flat rate
         4. retainer
         5. ct. appointment – gov. pays
   b. **The Role of the Marketplace**
      i. **Brobeck v. Telex** - $25K retainer, if cert. denied just keep retainer, if recover – get % w/ floor and ceiling, complaints were w/drawn – not in K w/ firm, client refused to pay
         1. Dist. Ct. – found for firm
            a. Unconscionable? – look at sophistication of the parties, bargaining power of the parties
               i. Straight K action, no ethical rules mentioned
         2. marketplace and K can decide if fee is reasonable
   c. **Unethical Fees**
      i. **Bushman** – asked Ds to sign $5K promissory note, $300 down, $50/mth., indigent family, atty. only did a little routine work, ct. ordered payment to atty. of $300 + costs – atty. did not tell ct. about promissory note!!!
         1. Ct. – TEST: so exorbitant and wholly disproportionate to the services rendered as to shock the conscience
      ii. **Fees – Rule 1.5**- a lawyer’s fee **shall** be reasonable.
         1. **Factors in Determining Reasonability (Part A, 1-8)**
a. Time & Labor Required – based on novelty and difficulty of the questions involved and required skill.
b. Precluding Other Cases – extent to which case will preclude the lawyer from taking other work
c. Customary Local Fees- for similar services.
d. Amount in dispute & results – (contingency fees)
e. Time limits on work- either imposed by client or nature of the work
f. Nature & Length of Relationship w/client
g. Experience/Reputation/Ability of Lawyer(s)
h. Whether Fee is Fixed or Contingent

2. Rate/Fee Must be Communicated to Client- when a lawyer takes on a client – the terms of fee should be promptly communicated. This should just be a basic understanding of the fees and need not be broken down overly in to specifics. The comment suggests that a written document be furnished to the client and that it may simply be a standard fee schedule given to the client.

a. If contingent – must be in writing

3. Contingent Fees – fee arrangements based on the outcome of cases are appropriate in some circumstances, with the following exceptions:

   a. Cannot Take Domestic Case on Contingency (sub. D(1))- a lawyer may not take a divorce or child custody matter for a fee based on outcome, however, note that past due alimony is a debt action and not a domestic case and such a fee is acceptable.

   b. Cannot Take Criminal Case on Contingency (sub. D(2))- for public policy reasons, a lawyer may not take a criminal case on a contingency basis.

   c. Contingency Must Not Create “Stake in Outcome of Litigation”- see infra rule 1.8(j) that precludes certain types of contingencies based on the payment of part of the matter being litigated to the lawyer.

iii. Non-Refundable Fees

   1. Matter of Cooperman – written fee arrangements, nonrefundable for any reason, tied to specific services

      a. Ct. – matter of public policy – compromises the right of a client to sever the fiduciary relationship w/ the lawyer

   2. Brobeck – general retainer agreement ok here

d. Contingent Fees

   i. Depends on occurrence and non-occurrence of events
ii. Atty. has personal economic interest in the case – *conflict of interest*???

iii. **MR 1.8(j)** – *exception to conflict rules for contingent fee cases*

iv. Can allow for more $ than hourly billing – pays atty. to take a risk

v. Not allowed in all cases: **MR 1.5(d)**
   1. domestic relations
   2. criminal

e. Court-Awarded Fee
   i. **Settlement Conditioned on Fee Waiver**
      1. *Evans v. Jeff D.* – P agreed to injunctive relief and waived fees and costs, Ps then filed motion for fees and costs – wanted fee waiver invalidated, sue under act that allows fees
         a. Does a Dist. Ct. have discretion to refuse to award fees?
         b. **Sup. Ct.** – YES
            i. Does acknowledge fee waivers may hurt chance of attys. taking these cases, does not see evidence of it though

f. Pro-Bono
   i. For the public – another way to finance legal work
   ii. **Voluntary Pro Bono Publico Service – Rule 6.1**- a lawyer should aspire to render at least 50 hours of pro bono publico legal services per year. These services should be rendered substantially for free to the following:
      1. **Persons of Limited Means**
      2. **Charitable Religious, Civic, Community Organizations in Matters designed to aid persons of limited means.**
      3. **Discounted/Free Services to Others**- services that are offered a severe discount may also count as part of pro bono hours, but should not comprise the substantial majority of pro bono hours. These services include:
         a. **Non-Profit Agencies** – where paying full price for legal services to further their purposes would significantly deplete the services of the organization.
         b. **Substantially Reduced Fees to persons of limited means**
         c. **Participation in activities for Improving the Law**
      4. **Judges Exempted**- where lawyers professional duties preclude such practices (such as Judges) the law is not expected to fulfill the required hours.

iii. **NOT MANDATORY**
iv. Public access theory – duty bound to give back to the public b/c assets created by the public
   1. argument for mandatory pro-bono
   2. society is structured so that attys. are required for many things
v. problems w/ state not funding these areas
vi. pressure to bill in firms also causes problems

IV. ETHICS IN ADVOCACY
a. Are lawyers Morally Accountable for their Clients? NO!
   i. MR 1.2 - Independence from Client’s Views/Activities (sub. B)-
      a lawyer’s representation of a client in no way indicates endorsement of his/her political, economic, social or moral views or activities.
   ii. Rules try to encourage attys. to talk UNPOPULAR cases

b. Truths & Confidences
   i. What are a lawyer’s responsibilities toward client perjury?
      1. MR 3.3(a)(4) - Offer Evidence Known to be False. If a lawyer has offered the material evidence and later discovers it is false, he shall take remedial measures.
         a. Does not matter if witness or a client
         b. Does not matter if civil or criminal
         c. Duty only lasts until end of the trial
         d. What if the information is privileged?
            i. If client actually lies, not the lawyer or a mistake by ct. officer – atty. must disclose truth even if privileged if cannot persuade client to rectify the situation – ABA Opinion 353 (p. 381)
   ii. MR 3.3(a)(4)
      1. may refuse to offer testimony if reasonable belief evidence is false
      2. duty of candor trumps privilege
   iii. MR 3.3(a)(4)
      1. may refuse to offer testimony if reasonable belief evidence is false
      2. duty of candor trumps privilege
   iv. factors to consider when a client lied or will lie – actual knowledge rare!!!
1. criminal history
2. credibility in community
3. changing stories, inconsistencies

v. REMEDIAL MEASURES
1. Criminal
   a. Try to dissuade client
   b. Right to counsel
   c. Withdraw
   d. Allow D to testify in narrative
   e. Reveal perjury
      i. People v. DePallo – D testified in narrative form, D claimed contrary statement were b/c of police lies, atty. believed D was lying, atty. told judge D’s testimony would be untruthful – *but did not know extent of D’s involvement*
         1. Ct. – *do not need to know substance of the lie, just need to know lie will happen* – atty. did the correct thing

2. Civil
   a. Try to dissuade client
   b. No right to counsel

c. Fostering Falsity or Advancing Truth?
   i. Cross-Examining/Discrediting the Truthful Witness
      1. Triangle Shirtwaist Fire – witness probably telling the truth – atty. created an impression the witness was lying
   ii. Appeals to Bias
      1. LeBlanc v. Honda – ct. rejected rule that would reverse *every* case, but condemned the practice
         a. *Appeals to bias are curable*
         b. There are different degrees of appeal to bias – should probably not be a per se rule

2. The MRs do not give a rule about appeals to bias
   a. MR 3.4(e) comes close - As Part of a Trial Proceeding a lawyer shall not-
      i. Allude to irrelevant and/or inadmissible evidence
      ii. Assert Personal Knowledge of Facts In Issue
      iii. Assert Personal Opinion - as to the Justness of a cause, credibility of a witness, or guilt or culpability of a client/opponent.

3. Jury selection is another way to rely on bias
   iii. The Boundaries of Proper Argument
      1. cannot present perjured testimony
2. otherwise – *lots of leniency*
   a. **Arguing for False Inferences**
      i. Ask jury to draw inference favorable to the client
         1. prosecutor should not
         2. defense counsel can – holds prosecution to their burden of proof
   
3. **Subin-Mitchell Debate**
   a. **Subin** – proper role of defense counsel = monitor – make sure prosecution has the facts to support a conviction
   b. **Mitchell** – duty to raise doubt, do anything but offer perjured testimony

4. **THERE IS A DISTINCTION B/W WHAT IS FALSE IN THE REAL WORLD AND WHAT IS FALSE IN THE TRIAL RECORD!!!**
   
   iv. **Literal Truth**
      1. an incomplete answer that is not literally false is ok
      2. **MR 3.3** – if an answer changes b/w a deposition and testimony at trial and client gives same answer – may have duty to disclose truth
   
   v. **Coaching**
      1. witness preparation is ethical
   
   vi. **Exploiting Error**
      1. **MR 3.3(a)(2)** – a lawyer shall not knowingly fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client
      
         2. if criminal witness gets fact wrong and works to D’s advantage?????
            a. **BOUNDARIES?**
   
   vii. **Silence**
      1. is atty. silence to answers that are technically true ok?
         a. **Southern Trenching v. Diago** – counsel concealed facts of another accident w/ same injuries –
            i. **Misleading not ok**
      
         2. **MR 3.3(a)(2)** - a lawyer shall not knowingly fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client
         a. Many states read very broadly – prophylactic approach
   
      3. **ALWAYS KNOW THE DIFFERENCE B/W TRUTH & SILENCE!!!!!**
         a. **INQUIRY: HELPING TO MAKE AN AFFIRMATIVE MISREPRESENTATION????**
d. Frivolous Positions and Abusive Tactics
   i. **FRCP 11** – sanctions - not used often, applied differently jurisdiction by jurisdiction

e. Dilatory Tactics
   i. P wants to settle and D wants to use every procedural tactic to draw the case out and break the P
   ii. **Expediting Litigation – Rule 3.2**- a lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.
      1. **Must Have Purpose Other than Delay** – the question of the purpose is to be decided on the standard of if a competent lawyer acting in good faith would regard the course of action as having substantial purpose. Realizing financial or other benefit from otherwise improper delay is not a legitimate interest, nor is convenience or frustration of purpose.
   iii. **Meritorious Claims & Contentions – Rule 3.1** – a lawyer shall **not** bring or defend a proceeding or assert an issue unless there is a basis for doing so that is not frivolous, including a good faith argument for revision of existing law.
      1. **Use to Fullest Benefit, But Not Abuse**- the advocate has a duty to use the legal process for the fullest benefit for a client, but has a duty not to abuse the system. **(need a good reason for delay!!!!)**
   iv. What if must produce documents in 30 days, but will not be punished for a delay in the jurisdiction?
      1. **MR 3.4(d)** - lawyers should make reasonably diligent effort to comply w/ discovery requests
      2. **MR 3.2, comment 2** – not an excuse that similar conduct is often tolerated
   v. **Frivolous Suits**
      1. long standing client wants you to file a suit, know case is a loser
         a. **MR 3.1, comment 2** – not frivolous merely b/c facts not substantiated or will develop through discovery or believe will not win
            i. Frivolous if action taken for purpose of harassing or maliciously injuring a person
   vi. **Hardball**
      1. frustrates the process
   vii. **Misstating Facts, Precedent, or the Record**
      1. difference b/w arguing false inferences and false facts
         a. cannot assert the false inferences as facts
      2. **MR 3.3(a)(1)** – cannot make a false statement of material fact to a tribunal
a. Don’t play around with the “material” provision
b. Can mislead the jury, BUT NOT THE CT.

3. **MR 3.3(a)(3) - must disclose adverse legal authority to the court**
   a. Adverse in the jurisdiction only
   b. Disclose if do not know if adverse

V. **SPECIAL ISSUES IN CRIMINAL ADVOCACY**

a. **Duties of the Prosecutor to Disclose Information to Defense Counsel**
   i. **U.S. v. Kojayan** – heroin case where prosecution did not disclose information to the defense and made false statements in relation to the information to the court misleading the jury
      1. not allowed to do this – *prosecutors have a higher duty than defense attorneys*
      2. sanction could be dismissal of the case

b. **Blaming the Victim**
   i. Rape shield laws – prior sexual history is not admissible, but allowed to question in limited circumstances
      1. policy matter – to encourage victims to come forward

c. **Destruction or Concealment of Physical Evidence**
   i. Suppose X steals $ and immediately goes to lawyer (not arrested yet), puts $ on lawyer’s desk, X leaves, what should lawyer do?
      1. no investigation yet so $ is not contraband
         a. ABA Crim. Just. Std. – “Defense counsel who receives a physical item under circumstances implicating a client in criminal conduct should disclose the location of or should deliver that item to law enforcement authorities **ONLY if required by law or court order or item is contraband**
            “counsel may suggest that the client destroy it where there is no pending case....”
      2. **MR 3.4(a)** – no unlawful obstruction of access to evidence
         a. Gives atty. a lot of leeway, protective of atty.-clent relationship

3. Ask:
   a. Is the evidence contraband?
   b. Has it been subpoenaed?

4. federal system:
   a. no statute that explicitly makes destruction of evidence a crime
   b. when there is a subpoena – intentional destruction is clearly criminal contempt or obstruction of justice
   c. before a subpoena is issued, the destruction of documents is criminal if:
      i. documents relevant to a pending grand jury or criminal investigation
ii. the intent of the actor must be “corrupt”
  d. difficult to prove under fed. law

5. states may have statutes of their own regarding destruction before a subpoena is issued
ii. People v. Meredith – alteration of evidence
  1. D told his lawyer where he put burnt wallet, atty. told investigator – he retrieved the wallet, Atty. examined it and turned it over to police
  2. Is investigators observation of the location of the wallet a privileged communication?
     a. Does the atty.-client privilege protect facts viewed and observed as a direct result of confidential communication? YES
     b. Does the privilege encompass a case where the defense, by altering or removing evidence, interferes with the prosecution’s opportunity to discover the evidence?
     c. NO – where defense counsel alters or removed physical evidence, he necessarily deprives the prosecution of the opportunity to observe that evidence in its original condition or location.
     d. If left the wallet – just looked – privilege intact

VI. CONFLICTS OF INTEREST
a. Concurrent Conflicts of Interest
   i. Background
   1. 2 current conflicts going on
   2. Analysis
      a. Is there an attorney-client relationship?
      b. duty of loyalty – compromise or risk of compromise?
      c. does the conflict exist pre-representation?
         i. Can the atty. still be loyal?
         ii. Client consent?
      d. potential for conflict to arise?
         i. If so, when?
            1. Can atty. still be loyal?
            2. Client consent?
      e. Is the conflict imputed?
   ii. CLIENT-LAWYER CONFLICTS
      1. Business Interests
         a. Matter of Neville – transaction w/ a client that did not relate to representation – Bly was not a client on this matter
            i. Ct – reasonable client standard
1. Bly knew atty. was not representing him 
2. BUT, Bly would value atty. advice 
3. so – NOT limited to transactions on which atty. represents client 

ii. ****Can still be a client for purpose of conflict of interest****
1. must give full disclosure 
2. just a start to tell Bly he needs independent counsel 
3. reveal full divergence of interests 
4. give pros/cons of entering into business w/ atty. 

b. **Conflict of Interest – Prohibited Transactions – Rule 1.8** – a lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessor, security or other pecuniary interest adverse to a client. 
   i. **Exceptions**- in addition to the exceptions below, the comment to the rule notes that “standard commercial transactions” are completely excluded from any prohibitions. 
   ii. **Terms are “fair and reasonable” to client** – and must be fully disclosed to the client in understandable terms. 
   iii. **Independent Counsel**- Client is given a reasonable opportunity to seek the advice of independent counsel. (do not have to tell client to do this though!) 
   iv. **Client Consents.** 

c. **Financial Interests of the Lawyer** 
   i. **MR 1.8(e)** – cannot provide financial assistance to client except: 
      1. advance ct. costs and expenses of litigation for contingent cases 
         a. cannot advance bail 
         b. repayment may be contingent on outcome of the case 
   ii. **Can an atty. lend client $$?** 
      1. NO, exceptions: 
         a. Humanitarian exceptions in a few states – necessities only 

2. **Triangular Conflict**
a. Other person paying for client’s representation and client’s and payor’s goals are different = CONFLICT

b. How do we deal w/ this type of situation?
   i. MR 1.7(b) - “Materially Adverse” to Another Client or the Lawyer- a lawyer shall not represent a client if such representation may be materially limited by the lawyer’s responsibilities to another client or himself (i.e. interest in fees or matter being litigated), the key is the likelihood the conflict will eventuate as determined by the lawyer, –unless—
      1. Reasonably believes the representation will not be adversely affected and
      2. Client consents after consultation

c. MR 1.8(f) - Shall only be Paid by Client- a lawyer shall not accept compensation for representing a client from other than the client unless
   i. Client consents after consultation
   ii. No interference with Professional Judgment of Lawyer
   iii. Client info is still subject to 1.6.

d. MR 5.4(c) – a lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer’s professional judgment in rendering such legal services

e. This happens w/ insurance companies

3. The Advocate-Witness Rule
   a. Lawyer as Witness – Rule 3.7- Because of the potential conflict of interest, a lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:
      i. Testimony is on Uncontested issue- here the potential conflict in only theoretical and does not prejudice either side.
      ii. Testimony relates to legal services rendered in case- such testimony may be necessary in trials of matters that allow the recovery of attorney’s fees – the exception prevent the need for a separate proceeding to be had for that purpose.
iii. Disqualification of the Lawyer would cause substantial hardship to client. – this is narrow exception as interpreted by the courts. A classic question here is where the lawyer is the sole person who overhears a conversation between a witness and someone else that could be critical evidence.

b. Imputed to Firm – additionally, no lawyer that would be precluded by 1.7 or 1.9 should appear in as an advocate in the case. – otherwise ok
   i. Other firm member can represent if does not materially limit representation (es: cross-examine another firm member)
   ii. See MR 1.10??

iii. CLIENT-CLIENT CONFLICTS
   1. Criminal Cases (Defense Lawyers)
      a. Arises when:
         i. D deprived of choice of atty. – 6th Amendment; OR
         ii. On appeal – D claims the atty. had a conflict – ineffective counsel
      b. Cuyler v. Sullivan – separate trials, 2 attys. represented 3 clients, only Sullivan convicted, D claims 6th Amend. Right violated – ineffective counsel claim, defense counsel did not want to expose other Ds so did not put on a defense for Sullivan – maybe??
         i. Sup. Ct. – Does the mere possibility of conflict of interest = deprivation of right to counsel?
            1. NO!!
            2. TEST: need showing of actual conflict
            i. Normally if no objection raised judge will continue on
      c. Butterworth – egregious conflict, atty. did not do anything to separate D from co-D, weak evidence, allegations other D engaged in criminal conduct w/ the firm
         i. It is the prosecution’s job to speak up if a D’s rights are being violated
      d. Wheat v. U.S. – many co-Ds, 1 co-D’s guilty plea not yet approved by the ct. (Gomez), 1 co-D gave a guilty plea (Bravo), conflict b/c would have to
examine Bravo at Wheat’s trial if Bravo called as a witness

i. Waiver enough to get around conflict?
   1. Ct. – NO
   2. there are interests besides that of D
   3. institutional interest in just verdicts
   4. trials should seem fair to those who view them

ii. Why then should trial cts. not have to inform Ds of their rights?

iii. TEST:
   1. presumption in favor of D’s choice of counsel
   2. rebut presumption by showing:
      a. actual conflict; OR
      b. serious potential for conflict

2. Criminal Cases (Prosecutors)
   a. Prosecutors can become conflicted
      i. Relation to D, D’s counsel
      ii. Financial interest
         1. Young – specially appointed
            prosecutor stood to gain financially
         2. BUT – private attys. can be brought in to represent the gov. – Microsoft

3. Civil Cases
   a. Fiandaca v. Cunningham – Atty. (P) – New Hampshire Legal Assistance, represented 2 classes, state (D) made settlement offer – facilities at Laconia State School, NHLA represented Garrity class – interest in Laconia School, Ps rejected the offer, D moved to disqualify NHLA b/c of conflict of interest
      i. NHLA could have asked for client’s consent – MR 1.7(b)
         1. representation materially limited?
      ii. Should the state have standing to make this motion?
         1. different jurisdictions – only represented party can object OR opposing party can object OR must show prejudice
      iii. Could 2 lawyers represent the classes if they work in the same office?
         1. NO – imputed conflict
2. **Imputed Disqualification – General Rule – 1.10** – while lawyers are associated in a firm, none of them shall *knowingly* represent a client when any one of the practicing alone would be prohibited from doing so by rules against conflict of interest. (*by 1.7 – materially limited*)

   iv. What about acting adversely on unrelated matters?

   1. **MR 1.7, comment 8** – usually NO – *duty of loyalty* – undivided loyalty to the client

      a. Must avoid the appearance of impropriety – IBM v. Levin

   b. **Confidentiality and Privilege in Joint-Defense and Multiple Representation**

      i. Info b/w atty. and joint clients may be privileged if relates to joint defense

         1. cannot use privilege as a shield if conflict erupts later

         2. atty. must be mindful of duties – equally among *all* clients

         3. should also tell client about risks

   ii. **RULE:** where an atty. acts for two or more parties having a common interest, neither party may exercise privilege in a subsequent controversy w/ the other

   c. **Malpractice Based Conflicts**

      i. **Simpson v. James** – atty. represents both buyer and seller in transaction, arranged payments adversely to seller, firm then cuts off representation of seller, buyer goes bankrupt and cannot pay seller

         1. Ct. – standard is *negligence*

            a. This was an atty.-client relationship b/c seller relied on the advice

VII. **SUCCESSIVE CONFLICTS OF INTEREST**

a. **MR 1.9**

   i. **Conflict of Interest – Former Client** – a lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the *same or substantially related* matter in which that person’ interest are *materially adverse* to the interests of he former client *unless the former client consents after consultation.*
(sub A) Such a waiver must be fully informed as to the lawyer
intent to take on a new client (comment 12).

ii. **Imputed Disqualification – Former Firm (sub B)** – a lawyer
shall not *knowingly* represent a person in the same or a
substantially related matter in which a firm with which the lawyer
formerly was associated had previously represented a client:
(burden of proof is on firm sought to be disqualified – Comment 7)
   1. Whose interest are materially adverse to that person –
      AND –
   2. About whom the lawyer acquired information protected by
      1.7 or 1.9(c) that is material to the matter. This knowledge
      should be *actual* and not constructive. (Comment 6)

iii. **Prohibited Use of Past Client Confidences (Sub C)**- a lawyer
who has formerly represented a client in a matter or whose present
or former firm has formerly represented a client in a matter shall
not thereafter:
   1. Use Information Relating to the Representation to
      Disadvantage the former client interest– except where it has
      since become generally know or would be allowed by 1.6
      or 3.3.
   2. Reveal information relating to the representation except as
      Rule 1.6 or 3.3 would permit or require.

b. **Private Practice (Switching Sides)**
   i. **Analytica v. NPD Research** – NPD moves to disqualify firm
      1. atty.-client relationship?
         a. YES – Malik retained originally, gave confidential
            info. for stock transaction
            i. Even if a former client, can still be
               considered a client if gave beneficial info.
      2. substantial relationship?
         a. If lawyer could have obtained confidential info. in
            the first representation that would have been
            relevant in the second representation
            i. Does not actually have to be revealed
      3. **MR 1.9(c)** – duty on confidentiality lives on – ex: giving
         files to new firm
      4. What if former atty. went to new firm and new firm want to
         represent Analytica?
         a. Firm could, but old atty. COULD NOT
         i. Must show confidences not spilling over
         b. **MR 1.10(a)** – imputed disqualification
            i. NO SCREENING PROCEDURE

c. **Migratory Lawyers and Imputed Disqualification**
   i. **MR 1.9(b)** – broad rule, *only requires disqualification if atty. has
      actual knowledge*, if so, entire new firm is disqualified
1. **NO SCREENING ALLOWED!!!! (MAJ. VIEW)**

2. BUT, several jurisdiction allow screening procedures b/c of hardship on big firms

3. BUT, MRs do provide a screening procedure for gov. attys.
   ii. What about atty. that move from gov. to private practice?

   1. **MR 1.11(a) - Successive Government & Private Employment** – except a permitted by law, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate agency consents after consultation.
      a. **Firm Also Disqualified** – the firm of a lawyer disqualified under the above is also disqualified by imputation unless: (this is allowed to avoid deterrence to entering public service comment 3).
         i. **Disqualified Lawyer is Screened from matter**
         ii. **Disqualified Lawyer receives no fee split from the matter** - this does not include a prior general partnership spit agreement, but only to the instant case’s revenue (comment 5)
         iii. **Written notice is promptly given to government agency to assure compliance.** Such notice is still considered prompt if it’s earlier disclosure would have materially harmed the clients interests. (Comment 6)
      b. **CANNOT REPRESENT – BUT CAN PARTICIPATE!!!**

2. **Armstrong v. McAlpin** – Altman – gov. atty. w/ SEC, Armstrong appointed receiver, Altman went to work for firm representing receiver, Armstrong picked firm
   a. Participated personally and substantially?
      i. **YES**
   b. Firm did a screen and got SEC consent, ct. approved use of the screen
   c. **MR 1.11, comment 2 – if gov. agency consents – do not need to screen, only screen if gov. does not consent**

3. “matter” applies to rulemaking capacity

4. **government is treated like a client when dealing w/ a conflict situation**

iii. Atty, moving from private to government practice
   1. participate in prosecution of client formerly defending?
      a. **NO**
2. MR 1.11(c)(1) – cannot even participate in the matter
Cannot Represent Government Against Past Private
Client (sub C)- a lawyer serving as a public officer shall
not: (this disqualification is not imputed to the rest of
the agency – Comment 9)
   a. Participate in a matter in which the lawyer
      participated personally & substantially while in
      private practice or non-government employ – unless
      no one else may act in the place of the attorney in
      the matter by law.
3. cannot even participate – unlike moving away from gov.
4. also – conflict is not imputed to the gov. agency – MR
   1.11, comment 9

VIII. LAWYERS FOR ENTITIES
   a. Conflicts and Confidentiality
      i. Tekni-Plex (TP)– Tang – sole S/H, firm represent for merger w/
         old TP, Tang retained firm for arbitration, new TP wants firm out
         of arbitration case against Tang
         1. Ct. – 3 prong test to disqualify firm
            a. New TP assumed role of former client
            b. Substantial relationship b/w former and present
               representation
            c. Interest of firms present client (Tang) materially
               adverse to interest of former client (old TP)
         2. similar to MR 1.9(a)
         3. possible to use old TP’s confidences against it in arbitration
            b/c new TP steps into old TP’s shoes
         4. Does old TP’s confidential communications transfer to new
            TP?
            a. 2 types of communications
               i. general business communications – do
                  transfer
               ii. M&A negotiations – DO NOT transfer
      ii. Who is the Client in Entity Representation?
         1. Default – represents entity (corp.), not officers
         2. MR 1.13 - Organizational Clients – a lawyer employed by
            an organization is subject to control by its duly authorized
            constituents. (sub A)
            a. Duty Organization, Not Officers (Sub B)- a
               lawyer shall proceed in the best interests of the
               organization if he knows an officer, etc. of an
               organization (who controls him under A) is acting
               inappropriately to the best interest of the
               organization. The lawyer is to consider a number of
               factor (such procedures of organization and impact,
etc.) in determining his action. Such measures may include: …

b. **May Represent Director, etc. (sub e)** – a lawyer may represent an organization and its directors in a matter where there is no conflict of interest as prohibited in rule 1.7. The organization may consent to dual representation where consent is given by the proper authority. This is particular issue in derivative suits. (Comment 10, 11) (*SUBJECT TO MR 1.7 conflicts rules*)

3. *partnerships* – represent partnership, NOT partners
4. *S/H derivative action* – S/Hs may want same atty. to represent them and officers – saves $
   a. Moving away from allowing this
5. *closely held corps.* –
   a. **Murphy & Demory** – new firm favored partner who tried to take over entity when not in entity’s best interest
      i. Ct. – firm committed malpractice

b. **Retaliatory Discharge & Whistleblowing**
   i. Most ERs are at-will ERs
   ii. Many states recognize a tort claim for retaliatory discharge
   iii. *In-House Counsel* –
      1. ethical duty v. duty of confidentiality and duty of loyalty
   iv. **General Dynamics** – ER claims unhappy w/ atty. work, ‘ee claims b/c brought up violations in company
      1. **Does the atty. have a cause of action for retaliatory discharge against the ER?**
         a. K issue –
         b. Tort issue
      2. **Difference b/w atty. ‘ee and non-atty. ‘ee?**
         a. Similar – economic dependence
         b. Different – ethically bound unlike non-atty.
   3. **ER argument**
      a. **Fracasse v. Brent** – absolute right to discharge an atty. at any time
         i. *Is this different?*
            1. YES – public policy problem, would give unqualified immunity to ER
   4. ‘ee argument
      a. at-will does not apply – K around it – no fired for doing job
   5. Ct. – K claim not likely to implicate atty.-client relationship
      a. Case allowed to proceed on, ct. recognizes retaliatory discharge action
6. BUT - Balla v. Gambro – maj. view - NO retaliatory discharge action allowed even though what ER did was wrong
   a. Suit only allowed if disclosure is MANDATORY

IX. NEGOTIATION AND TRANSACTION MATTERS
   a. The Bounds of the Proper Attorney Role in Negotiations
      i. MR 3.3(b) – atty. must reveal confidences to avoid assisting a fraudulent act in court, not towards a 3rd party
         1. trumps MR 1.6 if towards ct., not towards 3rd party
      ii. MR 1.16(a)(1) – if client wants atty. to assist in a fraud, the atty. must w/draw
         1. see MR 1.2
      iii. What if atty. already provided services and the client will use those services to perform a fraud?
         1. ABA Opinion 92-366 – client wanted a loan, fixed financial stmts., atty. did not know when gave a favorable opinion, client wants to keep using the atty’s. opinion to commit further frauds
            a. Reveal the past fraud?
               i. NO – MR 1.6 – only deals w/ future harm
            b. Full or partial w/draw? Mandatory or permissive?
               i. MR 1.16(b)(2) – lawyer has a choice to w/draw if client used services to perpetuate a fraud
               ii. Comment 2 – must w/draw if clients wants future fraudulent conduct
            c. Noisy w/draw? (P. 559)
               i. Purpose – to show atty. has clean hands, disaffirm documents, opinion, etc.
               ii. MR 1.6, comment 16, MR 1.2(d)
               iii. Different from revealing confidences?
               iv. RULE: limited disclosure only where client is determined to continue fraudulent conduct which the lawyer has unwittingly facilitated…no other way to stop the fraud…trumps duty to keep confidences
   b. Negotiating for Settlement Purposes
      i. Virzi v. Grand Trunk Warehouse – personal injury action, in mediation, P dies before settlement conf., D settled b/c P would have been a good witness at trial, P counsel did not know of death until in front of judge, P counsel did not say anything to D or judge
1. Ct. – no question atty. owed duty of candor to the ct., but not to opposing counsel (probably should tell the other atty. though)

2. BUT…
   a. **MR 4.1 - Truthfulness in Statements to Others** – In the course of representing a client, a lawyer shall not make a false statement of material fact or law to a third party or fail to disclose the same when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.
   b. **Obligation to Disclose Subject to Confidentiality Rule** - this rule subordinate to client confidentiality rule (Rule 1.6). However a lawyer may be required to disclose in order to avoid being considered part of the fraud.
   c. **Includes Failure to Correct False Assumption** - the comment notes that failure to correct the statement of another person that the lawyer knows to be false may also be considered a misrepresentation.

ii. What if client terminally ill, needs to settle, agreement w/ other side, client signs, client dies before other side signs, no ct. approval needed
   1. tell opposing counsel next time you talk, but do not have to call up atty. to tell him

X. **FREE SPEECH RIGHTS OF LAWYERS**
   a. **Background**
      i. 2 types of speech
         1. traditional speech (core speech)
         2. commercial speech
   b. **Public Comment About Pending Cases**
      i. William Kennedy Smith case – N.Y. Times printed an article undermining victim’s credibility
      ii. What could and should an atty. do in this situation?
          1. tell client’s version of events? No comment?
          2. What serves client’s best interests?
      iii. **Gentile v. State Bar** – defense atty. had press conference after indictment, press was already involved – police made a lot of statements, complaint filed after D’s acquittal – 6 months after press conference, atty. gave justification for press conference – press coverage put client in negative light and investigation took negative toll on client’s health
          1. **MR 3.6 - Trial Publicity** – a lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extra-judicial statement that a reasonable
person would expect to be disseminated if the lawyer knows or reasonably should know it will have a substantial likelihood of materially prejudicing the adjudication of the matter. This likelihood will vary with the nature of the proceeding – the comment mentions that a criminal jury trial is most susceptible, which a bench trial or proceeding is considered less likely.

a. **Statements Necessary to Protect Client from Material Prejudice** – (sub C) – subject to the restrictions of the rule, a lawyer may make statements that he reasonably believes necessary to prevent undue prejudicial effect of recent publicity. Statements must be limited to to such information necessary to mitigate the adverse publicity.

2. **MR 3.6, comment 6** – criminal jury trials more sensitive to extra-judicial speech

3. **Ct.** – determination of whether atty. statements were proper?
   a. Everything said was admitted into evidence
   b. No juror remembered the press conference
   c. Atty. researched limits of the state rule

c. **CRITIZING JUDGE & COURTS**
   i. **Robert Snyder** – criticized the system – CJA appointment pay, Sup. Ct. – reversed suspension of the atty.
   ii. **Matter of Holtzman** – DA had letter published, ADA letter charged judge w/ judicial misconduct – false allegations, ALJ found no evidence
   iii. **MR 8.2 - Judicial and Legal Officials** – a lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

XI. **MARKETING LEGAL SERVICES**
   a. **Advertising and In-Person Solicitation**
      i. **MR 7.2 - Advertising** – subject to Rule 7.1 and 7.3 a lawyer may advertise through public media (including Yellow Pages, legal directory, Television, Billboard Periodical, radio, etc.).
      ii. **Print Ads**
         1. **Bates** – advertising by lawyers is commercial speech protected by the 1st Amendment, only dealt w/ print ads, nothing wrong with the specified ad in this case, overruled Arizona’s blanket ban on atty. ads
      iii. **In-Person Solicitation**
1. **Ohralik** – lawyer contends that his solicitation of the 2 young women as clients is *indistinguishable from Bates*
   a. **Sup. Ct.** – disagrees, “In person solicitation of professional services by a lawyer does not stand on par w/ truthful advertising about the availability and terms of routine legal services, let alone w/ forms of speech more traditionally w/in the concern of the 1st Amendment.”

2. **Does Ohralik prohibit all in-person solicitation?**
   a. **Edenfield v. Fane** – examines the particular client and particular nature of the representation, *was an accountant*
      i. Sophistication of client
      ii. Prior relationship w/ another professional?
      iii. Narrows Ohralik

3. **allowed in a NARROW sense!!**

4. **MR 7.3 - Direct contact with Prospective Clients** – a lawyer **shall not** by in person or live telephone contact solicit professional employment from a prospective client with whom the lawyer has not family or prior professional relationship when a significant motive for the lawyer’s doing so it the lawyer’s pecuniary gain.
   a. **All Solicitation prohibited where:**
      i. **Prospective Client made known to lawyer a desire not to be solicited**
      ii. **It involves Coercion, Duress, or Harassment**

5. **All Solicitation Material must be marked “Advertising Material”** – on the outside envelope and at the beginning and end of any recorded communication. This does not include notices of personal or location changes or other general announcements.
   b. **Targeted Advertisements**
      i. **Zauderer** – Office of Discip. Counsel of State Bar filed a complaint against appellant charging him w/ a number of violation arising out of advertisements
         1. even a true statement can be restricted if there is a *substantial government interest* and the regulation is narrowly tailored so that there is no other way – **burden on the state**
         2. **What is the state’s substantial interest?**
            a. **Ohralik does not apply** – based upon differences b/w in-person solicitation and advertisements
            b. State argued will stir up litigation, is coercive, can apply prophylactic rule
               i. Rule did not prevent any of the vices
3. Ct – targeted ads OK!!

c. Targeted Mail
   i. Shapero – much more specific than targeted ads, targeted those known to need legal services
      1. Could the atty. in Ohralik sent mail to the 2 women?
         a. Probably – less coercive and misleading, don’t need a yes/no answer right on the spot
      2. measures are available to regulate targeted mail – show state agency first
      3. Ask:
         a. Misleading?
         b. Unjustified expectation of $?
   ii. Response
      1. MR 7.3 revised to allow targeted mail to potential clients

d. Solicitation By Public Interest And Class Action Lawyers
   i. Public Interest Lawyers
      1. In re Primus – can a state punish an atty. who, seeking to further political and ideological goals through associational activity (ACLU), including litigation, advises a lay person of her legal rights and disclosed in a subsequent letter that free legal assistance is available from a nonprofit org. with which the atty. is affiliated? (sterilization case)
         a. pecuniary v. political gain distinction
         b. MR 7.3 – depends on motive
   ii. Class Action Lawyers
      1. ct. recognizes the need to reach out to prospective clients
         a. MR 7.1 – cannot be misleading or coercive
         b. Need a particularized finding of abuse

e. SEE ALSO MRs 7.1, 7.2, 7.3, 7.4, 7.5

XII. SELF-REGULATION AND SANCTIONS
a. Supervisor Responsibilities
   i. MR 5.1 - Responsibility of a Partner or Supervisory Lawyer - lawyers in supervisory roles, whether in a traditional partnership, professional corporation, government situations, senior or intermediate have a number of obligations related to the supervision of the lawyers under them- Liability under the rules is explicitly limited to the below provisions by the comment to the rule, but doesn’t mean other civil or criminal liability may be incurred outside the liability.
   ii. An associate is asked by the partner of a firm to file a false affidavit w/ the court, which the associate does. Can the associate blame the partner? It depends on whether the associate knew it
was an ethical violation. If the associate knew it was wrong, then the associate is liable and cannot blame the partner.

1. **MR 5.2 - Responsibilities of a Subordinate Lawyer** – A subordinate lawyer is always subject to the Code, even if acting at the direction of some other attorney. However, a subordinate lawyer *does not violate* the code if acting in accordance with a supervisory lawyer’s reasonable resolution of an arguable question of professional duty. (i.e. the Nuremberg Defense can work for subordinate lawyers.)

b. **Malpractice and Breach of Fiduciary Duty**
   
i. **What remedies are available to clients when lawyers mess up?**
   
   1. Malpractice
   
   2. Discipline
   
   3. Ineffective assistance of counsel
   
   ii. W/ nonclients, the issue is whether the nonclient depended on the lawyer to their detriment.
   
   iii. Many jurisdictions will recognize malpractice claims by clients before malpractice claims by nonclients.
   
   iv. **Who is “client” in this context?**

   1. **Togstad v. Vesely, Otto, Miller & Keefe** [p. 692]

   a. Togstad was paralyzed as result of doctor’s negligence. Lawyer told Togstad that he didn’t have a medical malpractice case. Relying on this statement, Togstad did not seek other legal advice and did not bring suit; the statute of limitations ran out. Togstad brings action against the lawyer for malpractice.

   b. The court said that the lawyer acted negligently in failing to inform Togstad of the statute of limitations period. But for the lawyer’s negligence, Togstad would have been successful in prosecuting their medical malpractice claim.

   c. When the lawyer being sued testified, did he reveal any confidences? He could have under the rules. **MR 1.6(b)(2).**

   d. The lawyer claimed that he didn’t tell Togstad outright that he didn’t have a case because he told Togstad that he would consult a specialist in the area of medical malpractice.

   e. Togstad brings expert witnesses who say that ordinary care in such a case demands that the lawyer investigate medical records before deciding whether the case has any merit.
f. If you’re an attorney and a client comes to you w/ a case that is approaching the statute of limitations, lawyer has a responsibility to tell the client about that period of limitations.

g. Elements of legal malpractice action:
   i. Attorney-client relationship
   ii. Lawyer acted negligently or in breach of contract
   iii. These acts were the proximate cause of plaintiff’s damages
   iv. But for the lawyer’s conduct the plaintiffs would have been successful in the prosecution of their claim
      1. Does this requirement mean you have to try the whole case? No—you just have to show the weaknesses in the other side’s case.

h. In this case, the lawyer didn’t receive any money or documents from Togstad. So how did the court find that there was an attorney-client relationship? Because Togstad relied on the lawyer’s opinion and the lawyer didn’t qualify that opinion. Had the lawyer told the Togstad that he was not an expert in this situation and recommended that Togstad get another legal opinion, he might not have been liable here.

i. Court said that lawyer was negligent in failing to perform the minimal research that an ordinarily prudent attorney would do before rendering legal advice in a case of this nature.

j. Does this mean that every time someone comes into attorney’s office for advice that the attorney has to perform some kind of minimal research? No—lawyer can say that he is not an expert and can’t take the case. If the lawyer gives any opinion re: the merits of the person’s case, he should perform research.

k. Should lawyers have written disclaimers, that they did not render legal opinion and rejected taking the case? YES.

l. There are times when the court needs to define “client” broadly in order to protect the person who detrimentally relied on the attorney.

m. This case was a violation of the duty of care.

v. Breach of Fiduciary Duty
a. **Malpractice actions can also be brought when lawyer violates fiduciary duties.** You can have a situation when the lawyer wrongs the client but the merits of client’s case was not harmed; in that case, the lawyer will not be found to have violated the duty of care, but the lawyer COULD be found to have violated the fiduciary duty.

c. **Proving Malpractice**
   i. 2 ways of proving legal malpractice:
      1. Expert testimony
      2. Violation of ethical rules
   ii. *Smith* - Preamble to rules say that violation of ethical rules cannot give rise to presumption that legal duty has been breached, but in real life, courts consider violation of rules as evidence that lawyer violated legal duties. *Smith*, p. 710.
   iii. Proximate causation—client has to show that lawyer’s negligence caused his damages.
   iv. **Causation in Criminal Cases**
         a. Peeler had illegally made tax write-offs for wealthy investors. Peeler pleaded guilty and got a reduced sentence as a result. After Peeler plead guilty, she found out that the US Attorney had offered her absolute transactional immunity—they offered not to prosecute Peeler for her crime if she would become a witness and testify against her colleagues. Peeler’s lawyer did not inform her about this offer. Peeler sues her lawyer for malpractice.
         b. Court held that plaintiffs who have been convicted of a criminal offense may negate the sole proximate cause bar to their claim for legal malpractice in connection w/ that conviction only if they have been exonerated on direct appeal, through post-conviction relief, or otherwise.
         c. Peeler therefore had no cause of action against her attorney.
         d. What rule obliges the attorney to tell Peeler of the offer? *MR 1.4.*
         e. Why would the attorney in this case not tell Peeler about the immunity offer? Because the lawyer was representing the other defendants against whom Peeler would testify.
            i. So could Peeler bring another action against her lawyer? Yes—she could appeal on the basis of ineffective assistance of counsel. But what happens if Peeler files this claim
and court says that lawyer was ineffective? Could Peeler THEN bring a malpractice claim against her lawyer? Yes—then there would be evidence of exoneration. What does exoneration mean? That the person is not “legally guilty”.

2. A is arrested w/ a weapon, is convicted and files an appeal. A wins on appeal. A is technically guilty—he had the gun. But based on A’s appeal, can A sue his lawyer for malpractice? Has A been exonerated? It’s a touchy question. Exonerated means not legally guilty but on the other hand, in this case, the court seemed to emphasize that a convicted guilty person should not be able to profit from technicalities.

3. Proximate cause has different meanings in criminal and civil cases:
   a. Civil—nature of lawyer’s conduct and its relationship to client’s loss
   b. Criminal—client’s criminal conduct is principle cause of client’s loss and THEN court will look at contribution of lawyer’s conduct to client’s loss

d. Discipline
   i. Acts Justifying Discipline
      1. In re Warhaftig – dishonest and unlawful conduct – advance fees taking
         a. MR 1.15 - Safekeeping Property – a lawyer shall hold property of clients or 3rd persons that is in a lawyer’s possession in connection with a representation separate from the lawyer’s own property. Property must be appropriately safeguarded. (i.e. a safe deposit box, comment 1) Records must be kept for 5 years after termination of representation. A lawyer should also participate in a client loss fund where it exists (comment 4).
         i. Client Funds – must be kept in separate account located in bank within the state of the lawyer’s office, or elsewhere with consent.

2. Neglecting Client Matters
   a. Client’s mere complaint not enough, need objective conduct (ex: missing appointments)

3. Lawyer’s Private Life
   a. Criminal conduct

4. Racist and Sexist Conduct
a. Matter of Jordan Schiff – young atty. abusive toward female atty. during deposition, atty. did it again – TWICE
   i. Only got public censure (young??)
5. Failure to Report Another Lawyer’s Misconduct
   a. MR 8.1 - Reporting Professional Misconduct - a lawyer having knowledge that another lawyer has committed a violation of the Code that raises a substantial question as to that lawyer’s honesty, as a lawyer in other respects, shall inform the appropriate professional authority. RAT OUT YOUR FRIENDS!!!
      i. Important to Self-Regulation – this is an obligation based on lawyer self regulation, the comment notes that it is particularly important where the victim of the conduct may not become aware of it.
      ii. Definition of “Substantial” – is defined by the comment as referring to the seriousness of the offense and not the evidence of which the lawyer is aware.
      iii. Subject to Client Privilege – by the comment, lawyers are not required to report the violations of their clients who are lawyers, and therefore protected by MR 1.6
   ii. Frequently Cited Grounds for Denying Admission to the Bar
      1. MR 8.1 - Bar Admission and Disciplinary Matters – an applicant for admission to the bar, or lawyer in connection with an application or with a disciplinary matter shall not:
         a. Knowingly make a false statement of material fact.
         b. Fail to disclose fact necessary to avoid misapprehension of a material fact.
         c. Fail to respond to a request for information from admission or disciplinary body – subject to Rule 1.6 on client confidences and the Fifth Amendment, however such assertions of privilege must be done openly.